

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE HECHT COMPANY, a Corporation, *Appellant*,

vs.

BETTY-LYNNE JACOBSEN, an infant, by S. ELMER JACOBSEN,
her father and S. ELMER JACOBSEN, *Appellees*

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia
Circuit

FILED DEC 7 1948

Joseph W. Starnes

CLERK

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,035

THE HECHT COMPANY, INC., a Corporation, *Appellant*,

vs.

**BETTY-LYNNE JACOBSEN, an infant, by S. ELMER JACOBSEN,
her father and S. ELMER JACOBSEN, *Appellees***

**Appeal from the United States District Court
for the District of Columbia**

JOINT APPENDIX TO BRIEFS

567 Filed Jul 16 1946 Charles E. Stewart, Clerk
 IN THE DISTRICT COURT OF THE
 UNITED STATES FOR THE DISTRICT OF
 COLUMBIA

BETTY-LYNNE JACOBSEN, an infant,
 By S. Elmer Jacobsen, her father and next friend,
 1401 South Barton Street
 Arlington, Virginia
 and
 S. ELMER JACOBSEN,
 1401 South Barton Street,
 Arlington, Virginia,
 Plaintiffs,

vs.

THE HECHT COMPANY, Inc., a corporation,
 7th and F Streets, N. W.,
 Washington, D. C.,
 Defendant.
 Civil Action No. 35835

Complaint—for Negligence

(Damages for personal injuries to infant invitee, and loss,
 —negligent maintenance of escalator.)

1. This Court has jurisdiction of this case because it involves a suit for personal injuries and loss wherein the claims are in excess of Three Thousand (\$3,000.00) Dollars.

2. The plaintiff, Betty-Lynne Jacobsen, an infant, to wit, four years of age, by S. Elmer Jacobsen, her father and next friend, sues the defendant, The Hecht Company, Inc., a corporation, having offices and doing business in the District of Columbia, for that heretofore, to wit, on November 15, 1945, and for sometime prior thereto, said defendant corporation was engaged in business in the District of Columbia as the owner and operator of a Department Store, known as Hecht Company, in premises located at 7th and F. Streets, N. W., Washington, D. C., and in conjunction with the said business located as aforesaid, said

defendant maintained and used, controlled and operated a certain escalator which said defendant permitted and invited its patrons, including infant children, such as the plaintiff, Betty-Lynne Jacobsen, to use, as a means of transportation, while in and about said place of business.

568 3. That on November 15, 1945, at about 10:30

A. M., Betty-Lynne Jacobsen, an invitee and patron of said defendant, accompanied by her mother, an invitee and patron of said defendant, was in and upon said premises of said defendant, and did then and there make use of and step upon, an escalator maintained and provided for by said defendant, and supervised, controlled, and operated by said defendant for the use of invitees and patrons on said premises, well knowing and anticipating that infant children, such as the plaintiff, Betty-Lynne Jacobsen, would, or were likely to, use, as a means of transportation, while in and upon said premises. That while the said Betty-Lynne Jacobsen, was making use of said escalator, as aforesaid, the fingers of her right hand, and her right hand and wrist were caused to be caught in a portion of said escalator, which then and there was being negligently and carelessly maintained and used, controlled and operated, in such a manner as to allow her said fingers and said hand and wrist to be caught in a portion of said escalator and thereby causing injury thereto, and in such a manner as to allow the injury, to her said fingers and said hand and wrist to occur. That said escalator, as provided by the defendant, for the use of its invitees and patrons, including infant children invitees, was in the sole control and dominion of said defendant.

4. That said escalator was so constructed that there was an opening, in the mechanism thereof, in which said infant plaintiff's said fingers and said hand and wrist could be caught, and as thus constructed, said escalator maintained and used, controlled and operated by the said defendant, its agents, servants and employees, as aforesaid,

was negligently, carelessly and recklessly maintained and used, controlled and operated by the said defendant, its agents, servants and employees, in that the defendant maintained and used, controlled and operated said escala-

tor in a dangerous and unsafe condition respecting
 569 the use thereof by infant children invited by said defendant to use the same, such as the infant plaintiff herein, thereby making the same dangerous and unsafe for use by infant children, and as a result of the aforesaid negligence of the defendant, said infant plaintiff's fingers of her right hand and her right hand and wrist were caused to be caught in a portion of said escalator, by reason of which the said infant plaintiff sustained serious and permanent injuries.

5. The injuries sustained by the infant plaintiff, Betty-Lynne Jacobsen, consisted of her right little finger being almost completely avulsed requiring a surgical operation and making it necessary to complete the amputation of said right little finger at the metacarpophalangeal joint, and she sustained a severe laceration of the dorsum of her right hand, and incidental to said surgical operation, a repair was made on said laceration of the skin on the dorsum of said right hand, all leaving said infant plaintiff with a conspicuous scar at the site of amputation and on the dorsum of her right hand and causing permanent injury and disfigurement thereto, which may in the future require a plastic excision of the scar and partial resection of the head of the fifth metacarpal bone, of said hand, be carried out, and she sustained severe lacerations of the middle and fourth fingers of her right hand; the said infant plaintiff was rendered sick, sore, disordered and disfigured and her nervous system was severely shocked and permanently impaired, and said plaintiff was caused to lose much of her natural rest and sleep as a result of said injuries, and she suffered and will in the future suffer great physical and mental pain and anguish, and said plaintiff was otherwise injured; and said injuries caused said plaintiff

to be incapacitated for a period of time, requiring medical, surgical and nursing treatment and hospitalization, all of which will result in future loss of earnings and income before and after she becomes 21 years of age, and her future earning capacity has been impaired; and said
570 plaintiff was otherwise damaged.

6. That as a result of the injuries sustained by the infant plaintiff, Betty-Lynne Jacobsen, as aforesaid, she was confined to bed in the hospital and in her home for a period of time, and her father, the co-plaintiff, S. Elmer Jacobsen, will in the future lose the services of his said infant daughter and has been obliged to incur and will in the future incur large expense for medical, surgical, X-rays, hospital, nursing treatment and medicine; all to the damage of the infant plaintiff, Betty-Lynne Jacobsen, in the sum of Fifty Thousand (\$50,000.00) Dollars; and all to the damage of the plaintiff, S. Elmer Jacobsen, in the sum of Five Thousand (\$5,000.00) Dollars.

WHEREFORE, the plaintiff, Betty-Lynne Jacobsen, demands judgment against the said defendant in the sum of Fifty Thousand (\$50,000.00) Dollars, and the plaintiff, S. Elmer Jacobsen, demands judgment against the said defendant in the sum of Five Thousand (\$5,000.00) Dollars, besides the costs of this action.

Lester Wood

Lester Wood

821 - 15th Street, N. W.,

Washington 5, D. C.,

Attorney for Plaintiffs.

Demand for Jury Trial

The plaintiffs demand trial by jury in the above entitled cause under the provisions of Rule 38(b) of the Rules of Civil Procedure for the District Courts of the United States.

Lester Wood

Lester Wood

Attorney for Plaintiffs.

• • • • •
571 Filed Jul 29 1946 Charles E. Stewart, Clerk

Answer to Complaint for Damages
First Defense

The complaint fails to state any claim against this defendant upon which relief may be granted.

Second Defense

Defendant admits that it is engaged in business in the District of Columbia as alleged; defendant admits that it maintained an escalator as alleged in the second paragraph of the complaint. Defendant admits that on the date alleged the infant plaintiff, with her mother, was upon the premises of the defendant. The defendant denies that the infant plaintiff was using said escalator as alleged; the defendant admits that certain portions of the infant plaintiff's hands were engaged in a portion of the escalator, but denies that the same was negligently and carelessly maintained and used, controlled and operated. Defendant denies that it was guilty of any negligence in the premises and states that the escalator maintained was in a safe and proper condition, that it was operated normally and as designed, and that it is of the usual and approved
572 type of such escalator generally in use in similar stores in the District of Columbia.

The defendant has no information upon which to form a belief with reference to the injuries and damages alleged and claimed, and neither admits nor denies the same.

The defendant denies that any negligence on its part caused or contributed to the injuries or damages alleged.

Third Defense

For further answer to the complaint herein, the defendant states that the damages sustained by the infant plaintiff, if any, were the result of her own negligence.

Fourth Defense

For further answer to the complaint herein, the defendant states that the damages sustained by the infant plaintiff, if any, were as the result of the contributory negligence of said infant plaintiff.

Fifth Defense

For further answer to the complaint herein, the defendant states that the damages sustained by the plaintiff, S. Elmer Jacobsen, if any, were the result of sole negligence imputed to him.

Sixth Defense

For further answer to the complaint herein, the defendant states that the damages sustained by the plaintiff, S. Elmer Jacobsen, if any, were the result of contributory negligence imputed to him.

Austin F. Canfield

Austin F. Canfield

Julian H. Reis

Julian H. Reis

Attorneys for defendant,
637 Woodward Building,
Washington 5, D. C.

• • • •

573 Filed Apr 26 1947 Charles E. Stewart, Clerk

DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF COLUMBIA
JACOBSEN

Plaintiff.

vs.

HECHT CO.

Defendant.

Calendar No.
Civil Action No. 35835

Pretrial Proceedings

STATEMENT OF NATURE OF CASE:

This is an action in which the minor plaintiff by her next friend and the father of said minor child, in his own right, seeks to recover damages for injuries sustained by said minor plaintiff and for moneys laid out and expended by the father plaintiff as a result of the alleged negligence of the defendant.

The minor plaintiff being under the age of four years in company with her mother, was in the defendant's store, as business invitees. It is claimed that while using the escalator to go from the third to the second floor the minor plaintiff was injured by having her right hand caught in the aperture between the comb plate on the second floor and the disappearing steps of the escalator. The plaintiffs claim that the defendant was negligent in its failure to cover such aperture between the comb plate and steps at the point or points where such steps disappear under the comb plate and in allowing such condition to exist. They, further, claim that the defendant is negligent in maintaining, operating, conducting and supervising the escalator in such condition. They claim, further, that the defendant was negligent in its failure to provide a guard or watchman to prevent injuries, particularly, with respect to children of tender age not familiar with any danger in the use of said escalator. The plaintiffs further assert that the defendant was negligent in not using the safest and most approved type of escalator between the floors here involved, thus maintaining a dangerous condition that could have been prevented, and,

574 finally, the plaintiffs rely upon the doctrine of *Res Ipsa Loquitur* to establish prima facie negligence.

The plaintiffs assert that the minor plaintiff's hand was on the disappearing step near the comb plate by reason

of the fact that she was thrown to a sitting position by the operation of the escalator and she was using her hand to assist her to regain her standing position. The plaintiffs assert that the defendant owed to the said minor plaintiff the highest degree of care.

The injuries sustained by the minor plaintiff consist of the permanent loss of a finger of the right hand with resulting disability and that she suffered a permanent disfigurement of the hand.

The special damages consists of medical expense in the amount of \$154.75, in addition to services and care rendered by the Medical Department of the United States Navy. It is claimed that a further operation may be necessary to improve the scar condition and it is estimated that the cost of such operation would be between \$300 and \$400.

The defendant denies any negligence on its part and asserts that its escalator was of a type and in the condition authorized and permitted by the regulations of the Dist. of Col., and that it was operated and maintained in a proper condition.

The defendant, further, asserts that the parent accompanying the minor plaintiff was negligent in permitting the child to ride on said escalator without proper supervision or, in any event, was contributorily negligent in such regard and may not recover on behalf of themselves or either parent.

STIPULATIONS: By agreement of counsel for the respective parties, present in Court, it is ordered that the subsequent course of this action shall be governed by the following stipulations unless modified by the Court to prevent manifest injustice:

It is stipulated that the following may be received in evidence without formal proof subject to objection as to relevancy:

All hospital records and x-ray photographs relating to the injuries of the minor plaintiff here involved.

Two photographs showing minor plaintiff's hands.

Three photographs showing escalator here involved.

Two photographs showing escalator used above third floor.

All such photographs being initialled by the Pretrial Court.

All relevant regulations relating to the installation, operation and maintenance of escalators.

In accordance with the agreement defendant shall furnish to plaintiff prior to trial measurements of the two types of escalators used in defendant's store insofar as concerns the comb plate and the disappearing step and, more particularly described in deposition taken.

Jas. W. Morris

Pretrial Justice.

Dated April 26, 1947

• • • •

575 Filed June 16 1948 Harry M. Hull, Clerk

Plaintiff's Prayer No. 1.

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use proper care in the management of one's property or person.

Inasmuch as the amount of caution used by the ordinarily prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that the exercise of proper care, the amount of caution required, will vary in accordance with the nature of the act and the surrounding circumstances. To put the matter in another way, the amount of caution required by the law increases, as does the danger that reasonably should be apprehended. In this case it was the duty of the defendant, The Hecht Company, Inc., to use the highest degree of care for the safety of the infant plaintiff.

[Withdrawn]

• • • •

576 Filed June 16 1948 Harry M. Hull, Clerk

Plaintiff's Prayer No. 2.

If the jury believe from the evidence that on or about November 15, 1945, the plaintiff was injured by reason of the dangerous construction of the escalator, and further that said injuries resulted from a want of the highest degree of care on the part of the defendant, The Hecht Company, Inc., in the construction, maintenance and operation of said escalator, then their verdict should be for the plaintiff.

[Granted as amended]

• • • •

577 Filed June 16 1948 Harry M. Hull, Clerk

Plaintiff's Prayer No. 2-A

The jury are instructed as a matter of law, that if they find from a preponderance of the evidence that the defendant was guilty of any one of the acts of negligence alleged in the complaint and that such negligence was the proximate cause of the injuries sustained by the infant plaintiff, then their verdict should be for the infant plaintiff.

[Withdrawn]

• • • •

578 Filed June 16 1948 Harry M. Hull, Clerk

Plaintiff's Prayer No. 3.

It is ordinarily necessary to exercise greater care for the protection and safety of a young child than for an adult person who possesses normal physical and mental faculties. One dealing with children must anticipate the ordinary behavior of children. The fact that they usually

cannot and do not exercise the same degree of prudence for their own safety as adults, that they are often thoughtless and impulsive, imposes a duty to exercise a proportional vigilance and caution on those dealing with children and from whose conduct injury to a child may result.

[Granted]

* * * *

579 Filed June 16 1948 Harry M. Hull, Clerk

Plaintiff's Prayer No. 4.

As an operator of the escalator, referred to in the evidence, the defendant in the transportation of the infant plaintiff, Betty-Lynne Jacobsen, as a passenger, was required to use the highest degree of care for the safe carriage of said infant plaintiff, as a passenger. This highest degree of care does not make the defendant an insurer of the infant plaintiff's safety, but it does require the defendant to exercise all the care and skill and foresight within reason for the safe carriage of its passengers. A failure to exercise that degree of skill constitutes negligence, and, if such negligence is the proximate cause of injuries to the infant passenger, the defendant would be liable.

[Granted]

* * * *

580 Filed June 16 1948 Harry M. Hull, Clerk

Plaintiff's Prayer No. 5

The Court instructs the jury as a matter of law, that they must decide this case on the evidence adduced here. The jury are the sole judges of the facts in this case. In considering the case, the jury should take into account the interest of witnesses in the result of the suit, and consider the possibility of bias because of such interest. The jury are further instructed that it is their exclusive province to determine the credibility of any witness.

[Withdrawn]

* * * *

581 Filed June 16 1948 Harry M. Hull, Clerk

Plaintiff's Prayer No. 6

If the jury shall find from the evidence that the infant plaintiff, Betty-Lynne Jacobsen, is entitled to recover from the defendant, it then becomes its duty to award reasonable damages for the injuries that they may find from the evidence said plaintiff sustained.

In fixing the amount of the damages, the jury are instructed that she is entitled to fair and reasonable compensation for all physical injuries and shock as may be shown by the evidence to have been sustained by her, the character and extent of her physical disabilities at the time the injuries were sustained, and the extent of the injury to the infant plaintiff's right hand, back of right hand, and permanent disfiguration to right hand and permanent loss of right little finger, as shown by the evidence, and for the pain, discomfort and inconvenience which the evidence shows she has suffered and may hereafter suffer on account of or as a result of her said injuries.

[Granted]

* * * *

582 Filed June 16 1948 Harry M. Hull, Clerk

Plaintiff's Prayer No. 7.

The jury are instructed that if they find, from the evidence, that the plaintiff, S. Elmer Jacobsen, is entitled to recover from the defendant, it then becomes its duty to award reasonable damages for the loss of expenses already incurred and which in the future which it is reasonably certain will be incurred by him, and for future loss of services of his infant daughter, before she becomes of age, which they may find, from the evidence, the plaintiff, S. Elmer Jacobsen, may sustain.

[Granted as amended]

* * * *

583 Filed June 16 1948 Harry M. Hull, Clerk

Plaintiff's Prayer No. 8.

A party has succeeded in carrying his burden of proof on an issue of fact, if the evidence favoring his side of the question is more convincing than that tending to support the contrary side, and if it causes the jurors to believe that on that issue the probability of truth favors that party.

[Covered by Gen'l Chg.]

* * * *

584 Filed June 16 1948 Harry M. Hull, Clerk

Plaintiff's Prayer No. 11.

The jury are instructed, as a matter of law, that the conduct of Helena Jacobsen, mother of the infant plaintiff, Betty-Lynne Jacobsen, at The Hecht Company store on November 15, 1945, the day in question, in no way affects the action of the infant plaintiff for her own injuries and does not preclude said infant plaintiff from recovery in this case for her own injuries.

[Denied. See Ct Instr B.]

* * * *

585 Filed June 16 1948 Harry M. Hull, Clerk

Plaintiff's Prayer No. 12

The rule of law in regard to the negligence of an adult and the rule in regard to that of an infant of tender years is quite different. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than one of seven; and of a child of seven less than one of twelve or fifteen. The caution required is according to the maturity and capacity

of the child, and this is to be determined in each case by the circumstances of that case.

[Denied. See Ct Instr A]

* * * *

586 Filed June 16 1948 Harry M. Hull, Clerk

Defendant's Instruction No. 1.

The jury are instructed as a matter of law that before the plaintiffs can recover in this case, they must establish by a fair preponderance of the evidence two necessary factors, they must first establish that the defendant committed an act of negligence, secondly, they must establish that the negligence was the proximate cause of the injuries sustained by the infant plaintiff. If the evidence fails to establish either of these two factors, then their verdict must be for the defendant.

[Granted]

* * * *

587 Filed June 16 1948 Harry M. Hull, Clerk

Defendant's Instruction No. 2.

The jury are further instructed as a matter of law that the defendant is not required to maintain the newest or most modern appliances in its store. If the jury find by a preponderance of the evidence in this case that the escalator in 1934 was purchased from a reputable manufacturer and that its use was common for the purpose indicated, then the defendant would have fulfilled its duty so far as furnishing a reasonably safe place for the use of its customers and their verdict must be for the defendant.

[Denied. Ex. noted]

* * * *

588 Filed June 16 1948 Harry M. Hull, Clerk

Defendant's Instruction No. 3

The jury are further instructed as a matter of law that if the evidence in this case establishes that in 1940 there was a more modern or improved escalator on the market and the defendant failed to install it in their store, this fact alone cannot be found to be an act of negligence on the part of the defendant unless it appears from a fair preponderance of the evidence that the more modern or improved device referred to was such as would have prevented the accident suffered by the infant plaintiff. In this regard it will be necessary for the plaintiff to have shown that the new device would have ruled out any likelihood of injury or damage to the infant plaintiff under the evidence presented in this case.

[Denied]

* * * *

589 Filed June 16 1948 Harry M. Hull, Clerk

Defendant's Instruction No. 4.

The jury are further instructed as a matter of law that the failure or omission of the defendant to install the more modern or up to date escalator when the same came on the market, is not in and of itself an act of negligence, unless it appears from a fair preponderance of the evidence that a person exercising the highest degree of skill and foresight within reason for the safe carriage of his passengers would supplant the old installation with the new and would not continue to use the old installation because of the hazard to his passengers.

[Granted]

* * * *

590 Filed June 16 1948 Harry M. Hull, Clerk

Defendant's Instruction No. 4.

The jury are further instructed as a matter of law that the failure or omission of the defendant to install the more modern or up to date escalator when the same came on the market, is not in and of itself an act of negligence.

[Withdrawn]

* * * *

591 Filed June 16 1948 Harry M. Hull, Clerk

Defendant's Instruction No. 5.

The jury are instructed as a matter of law that the mere happening of an accident is no proof of negligence. The plaintiffs have the burden of proving negligence on the part of the defendant before they can recover in this case.

[Granted]

* * * *

592 Filed June 16 1948 Harry M. Hull, Clerk

Defendant's Instruction No. 6

The jury are instructed that there are two claims here for your consideration, namely, a claim by the child for damages sustained by the child herself as a result of the negligence of the defendant. This child being an infant under 21 years of age, under our law cannot maintain an action in his own name, and for that reason it must be brought on his behalf by some one acting as we say in law "his next friend." Such damages if awarded by you would be for the child only. The companion action is brought by his father, as his parent who claims damages for himself for such things as monies expended by the father for medical care and attention, hospital expenses, or any other expenses found by you from the evidence to be occasioned

by the father as a result of the girl's injuries. Such damages would be as compensation to the father for the monetary losses suffered by him on behalf of his daughter; however if from a preponderance of the evidence in this case, you find that the mother was negligent in the manner in which she looked after the infant plaintiff while in defendant's store, and as a result of her negligence, she either was the sole cause, or contributing cause of the injuries, even though you may find the defendant also guilty of negligence, you are not permitted to award any damages to the plaintiff father.

[Granted]

• • • •

593 Filed June 16 1948 Harry M. Hull, Clerk

Defendant's Instruction No. 7.

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still no one may be held liable for injuries resulting from it. Both negligence and proximate cause as defined by the Court are requisites for founding liability.

[Granted]

• • • •

594 Filed June 16 1948 Harry M. Hull, Clerk

Defendant's Instruction No. 8.

The jury are instructed as a matter of law that while a lesser degree of care is required of an infant of tender years than that of an adult and that this degree of care depends upon the intelligence, the age and knowledge of

the infant, still a child of almost four years of age depending upon these factors may be held to be guilty of contributory negligence. It is for the jury to say by a preponderance of the evidence in this case whether or not the infant plaintiff was capable and intelligent enough to appreciate the danger of its conduct in going down the moving escalator steps under the conditions described by its mother. If the jury find by a preponderance of the evidence that the child could and did understand the danger of what it was doing, then the child may be held guilty of contributory negligence and if you find this to be a fact, then there can be no recovery in this case for either plaintiff.

[Denied. See Ct A.]

* * * *

595 Filed June 16 1948 Harry M. Hull, Clerk

Verdict and Judgment

This cause having come on for hearing on the 10th day of June, 1948, before the Court and a jury of good and lawful persons of this district, to wit;

Elva P. Richardson	Walter L. Brown
Daisy H. Ingram	Robert T. Hoskinson
Earl F. Hazel	Thomas E. Hall
Arthur S. Pierce	Ruth M. Colbert
Francis J. Montgomery	Mary J. Cameron
Melvin B. Starks	William B. Knott

who, after having been duly sworn to well and truly try the issues between, Betty-Lynne Jacobsen, an infant, by S. Elmer Jacobsen, her father and next friend and S. Elmer Jacobsen, Plaintiffs, and The Hecht Company, Inc., a corporation, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 16th day of June, 1948, that they find the issues aforesaid in

favor of the plaintiff, Betty-Lynne Jacobsen, an infant, by S. Elmer Jacobsen, her father and next friend, in the sum of Fifteen Thousand Dollars (\$15,000.) and in favor of Plaintiff S. Elmer Jacobsen, in the sum of Two Thousand Dollars (\$2000.) both VS; defendant.

Wherefore, it is adjudged that plaintiff, Betty-Lynne Jacobsen, an infant, by S. Elmer Jacobsen, her father and next friend, recover of the said defendant the sum of Fifteen Thousand Dollars, (\$15,000) and the plaintiff S. Elmer Jacobsen, recover of the said defendant the sum of Two Thousand Dollars, (\$2000.), each with costs.

Harry M. Hull, Clerk,
by George A. Watts
Deputy Clerk.

By direction of Justice Morris.

* * * *

598 Filed Jul 19 1948 Harry M. Hull, Clerk

Order Overruling Motion for New Trial

Upon the coming on for hearing of the motion filed herein by defendant, for a new trial, it is this 19th day of July, 1948, ordered that said motion be, and the same is hereby overruled.

HARRY M. HULL, Clerk,
By Eleanor E. Jobe
Deputy Clerk.

By direction of
Justice Jas. W. Morris

* * * *

599 Filed Jul 29 1948 Harry M. Hull, Clerk

Notice of Appeal

Notice is hereby given this 29th day of July, 1948, that the defendant, The Hecht Company, Inc., hereby appeals

to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 19th day of July, 1948 in favor of the plaintiffs against said defendant.

Austin F. Canfield
Attorney for defendant
637 Woodward Building,
Washington 5, D. C.

* * * *

47

Dr. Robert J. Coffey

* * * *

Direct Examination

Q Would you please state your full name, Doctor? A Robert James Coffey.

Q Are you a practicing physician in the City of Washington? A I am.

* * * *

48 A I attended the Georgetown School of Medicine, and I was at the Mayo Clinic for six years,—

* * * *

By Mr. Wood:

Q What, if any, medical institutions or societies are you connected with at the present time, Doctor? A I am at the present time connected with the Georgetown School of Medicine, Professor of Surgery.

Q What, if any, hospitals in town are you connected with? A I should say about six or seven.

Q And the new Georgetown Hospital also recently opened? A Yes.

Q Did you study, or have you specialized in any specific branch of medicine, Doctor? A Surgery.

Q Where did you study that? A Mayo Clinic.

49 Q For how long? A Six years.

Q You are then engaged in the field of surgery specifically, are you not? A Yes.

Q How long have you been in that specialty, Doctor?

A About fourteen years.

Q About fourteen years. Directing your attention to November 15, 1945, I will ask you if you were at that time in the Military Service? A I was in the United States Naval Reserve.

Q Where were you stationed at that time, Doctor? A I was stationed at the Navy Department, Washington.

Q Prior to that you had practiced in Washington continuously from the time you left school? A That is right.

Q And on that day I will ask you if you had occasion to be at the Children's Hospital on the morning of that day. A I was there daily.

Q Prior to that did you know Mr. S. Elmer Jacobsen or Mrs. Jacobsen, his wife? A No, I didn't.

Q Or Betty-Lynne, the daughter? A No.

Q Will you please tell the Court and the jury the
50 circumstances under which you met them that day.

A Well, my duties caring for Navy attendants took me to the hospital most every day, and I recall on that particular day I was operating, and I was there at that time—

* * * *

Q I asked you whether you attended the child? A That is right, yes, I remember that.

Q Will you tell us then in your own way what you did after that at the Children's Hospital? A Well, the child had received this injury to her hand, there was a double avulsion of one finger and laceration of other fingers, and then the dorsum, the skin, the dorsum of her right, and the situation demanded immediate amputation. Amputation procedure was carried out in the operating room under general anesthesia very shortly thereafter.

Q Will you tell us then about how long it took for the operation, Doctor? A I should say roughly about an hour.

Q Will you explain in detail what the operation took in? A Well, the operation consisted of the removal of the small finger, the repair of the tendons that were destroyed as a result of the injury, exploring the region for other severed tendons, and exploring the laceration of the other fingers, and carrying out a plastic procedure on the hand, that is, the rejoinder of the skin lacerations, and sewing them up.

Q Will you please give us a description of the appearance of the dorsum of the right hand when you first saw it after the bandage was taken off, and before you operated? A It was what we call an avulsed wound. In other words, the skin had been torn from the dorsum of the hand and lacerated, and it was lacerated as a result of the injury. In other words, the tissues had not only been torn, they had been mashed too.

Q Tell us whether you observed anything with respect to the ring finger, or the second finger? A There was a laceration on both of those fingers.

Q Doctor, I hand you a photograph that has been marked by the pretrial justice, and ask you whether or not that gives a fair representation of the right hand of Betty-Lynne Jacobsen after it was operated on—that picture was taken within, I think a week or ten days, in that neighborhood, after the accident. A Yes, I think that demonstrates the condition at that time very well.

Q Thank you. I hand you another photograph, also marked by the pretrial justice, showing a different view of the hand, and ask you if that is a fair representation of the appearance of the hand immediately after you performed the operation—it was taken at the same—taken sometime after? A Yes, I would say so.

Q Both of them? A Yes.

Mr. Wood: I would like to have this marked at this time.

The Court: Any objection?

Mr. Canfield: No objection.

[The pictures were marked respectively Exhibits P-1 and P-2 and received in evidence.]

* * * *

Q Dr. Coffey, did you continue—does that take in the entire operation at the Children's Hospital?
53 A Yes, that was the operative procedure. The child remained there as a patient.

Q Did you continue treating her after that, while she remained at the hospital? A I did.

Q Do you recall how long she did remain at the hospital? A I am not sure, I believe between five days and a week, possibly.

Q After she left the hospital, during that period, did the progress go on favorably from this operation? A There was a mild secondary infection in the hand, about what we had anticipated because of the contamination of the wound at the time, but other than that—

Q After she left the hospital you continued to treat her in connection with the hand? A Yes, I saw her on numerous occasions at the Naval Dispensary where my offices were.

Q Did there come a time shortly after that that you left the Navy—about how soon after that, if you recall? A I would say six months or a year.

Q Then did you return to private practice in Washington again as you had formerly had before? A I did.

54 Q After that did you continue to see Betty-Lynne and treat her hand? A Yes, I mean by that the child was my private patient.

Q Will you describe to the Court and jury the condition and appearance of the hand after it had healed or started to heal? A The child developed a keloid in her scar where it extended up the dorsum of the hand, which is an overgrowth of the scar tissue, forming a very prominent scar which occurs in certain people, and it happened to occur in her case.

Q Will you please describe a little more in detail what a keloid scar means in lay words? A In the normal person the healing process results in a minimal scar which serves just to bridge the necessary gap of time in conformity with the defect that exists. There are a certain group of individuals who for some reason—we do not understand why, develop an abnormal production of scar tissue creating high, unsightly, unnecessarily large scars, and that is what developed in this little girl's case.

Q And that indicates that some people, other people, may not have it, is that what you mean? A That
55 is right, a small percentage of people have it.

Q But it has nothing to do with the mild infection that you spoke of a moment ago? A That might have been the immediately provoking factor, but it does not in some cases.

Q It can develop without any infection? A It does.

Q Does it have a tendency to make or shall I say make a more conspicuous scar than if the keloid had not developed? A Definitely.

Q Would you say that the scar that did develop on the back of Betty-Lynne's hand, that keloid was a severe large conspicuous one? A Yes, all keloids are.

Q I will ask you, Doctor, if you can tell us without the little finger of the right hand the approximate percentage of limitation in the use of such hand, if you can give us any percentage.

The Court: Do you mean functionally?

Mr. Wood: Functionally, that is right.

By Mr. Wood:

Q In your opinion can you give us a percentage of the loss of use or limitation of use of the right hand without the little finger? A That is a very difficult
56 question to answer, it depends on a number of factors, such as occupation—

Mr. Canfield: If the Court please, unless it can be specifically answered I will have to object.

By Mr. Wood:

Q You can answer it, can you? A I can express an opinion.

Q That is what I want, your opinion. A I would base the disability in this particular case on the basis of five fingers to the hand and granted those two are not the most important, disability is sometimes estimated on the basis of one hundred per cent for five, or twenty per cent for one. In this particular case I would estimate it as somewhere between ten and twenty per cent.

Q Would, during life, a limitation or disfigurement of this type, in your opinion, affect a girl more than it would a boy?

Mr. Canfield: I object to that, if the Court please.

The Court: I fail to see how the doctor is an expert witness, just how he can state that any more than one without the knowledge of a physician, I mean, is that a matter that is within the realm of peculiar medical knowledge?

Mr. Wood: I think it is in the field he is in, having hands in a scarred condition, that he has certainly had some experience in observing the psychological handicaps as well as the medical knowledge with reference to
57 the treatment of it.

The Court: I will ask the reporter to repeat the question.

[The reporter read the last question as above set forth.]

Mr. Canfield: The same objection.

The Court: You want his opinion as a medical man on that score, or just somebody like the rest of us?

Mr. Canfield: He is a surgeon, not a cosmetician.

The Court: In your particular field of medicine do you, or have you an opinion on that that would distinguish it from a lay opinion?

The Witness: Only in this regard, sometimes our treatment is predicated on the sex of the patient. I mean, you might have something for one—

The Court: Yes.

The Witness: And for another you would not.

The Court: That is right, you are a doctor, and not a cosmetician, you might have a condition with respect to a woman that you might not have with respect to a man.

The Witness: Yes.

The Court: I think I can agree with you on that.

By Mr. Wood:

Q In your field of surgery, Doctor, have you not performed many operations on scars, high difficult
58 scarred conditions? A Yes, I have done a number.

Q In doing that you have observed the psychological effect that a scar may have on an individual be it man or woman?

Mr. Canfield: I will certainly object to that question, if the Court please.

The Court: I think the doctor can state, like any other, that a girl feels more distressed at having a scar than a man. Don't you think that is so?

Mr. Canfield: Well, that is a psychological question, it is not an element of damage. I will admit that the doctor is a renowned surgeon—

The Court: I do not think it takes a renowned surgeon to state that it would distress a girl to have a scar.

Mr. Wood: Only as a surgeon can he speak.

The Court: All right.

By Mr. Wood:

Q Doctor, would it interfere with her use of the hand in playing a piano or typewriting, and if so, in your opinion how much?

Mr. Canfield: If the Court please, I don't think you have to have a doctor's views about that.

The Court: He is talking about the functional limitations or impairment of the hand if there was anything that required the use of the little finger, that
59 would be an impairment if you didn't have the little finger.

Q Would it interfere or handicap the infant plaintiff, Doctor, in playing various types of games or engaging in athletics that girls do participate in?

Mr. Canfield: I will certainly object to that.

The Court: I will let him answer. You want to adjourn by 3:15. I don't believe we are getting ahead very rapidly.

The Witness: Obviously it would interfere with any game that involved the use of all of her fingers if you are without one of your fingers.

The Court: Of course it would.

The Witness: In other words, if you want me to answer this as I know how, when you lose any one part of the hand, because of the muscles of the hand, the laceration of the muscles and the tendons, there is a lack of coordination of mechanism. Some people compensate, overcome that incoordination, others do not, so I would say that it definitely would interfere with the functioning of the hand in many activities.

Q Don't answer this until Mr. Canfield has an opportunity to object.

60 Have you, in the course of your practice as a surgeon, particularly in the field of plastic repair operation on scars, under conditions that required it, observed any psychological effect that may arise by reason of the deformity—

Mr. Canfield: I object.

The Court: Is not this, Mr. Canfield, the same question, whether or not it would cause mental anguish?

Mr. Canfield: Well, psychological.

The Court: Well, psychological is just another term for mental pain or distress, it strikes me. I think I will let the question be answered, if he can answer it.

By Mr. Wood:

Q Answer it, Doctor. A There is a rather well-known rule that the longer you receive some disfiguration the better it is to have it changed, I mean, if it is recently

received, in the case of a fifteen year old girl it would be less well compensated psychologically than a four year old girl and certainly unless the child is properly psychologically handled it might well develop some mental quirk or personality conflict. Normally, in a think like that, such as playing with other children, and what-not, and having other children shrink and call attention to this deformity, I think it depends a lot on circumstances, how
 61 she is handled in school and how she is handled by her mother.

Q If in this particular case she has started school, and going to school, the other children would not play with her, would not take her hand, some of these psychological handicaps that would give rise to hurt feelings, and so forth, in her association with the school children, and playing games around the home—

Mr. Canfield: That I must object to. I say that is something we cannot even consider.

Mr. Wood: It seems to me that it falls within the mental anguish.

Mr. Canfield: How can Dr. Coffey know what she is going to be exposed to?

Mr. Wood: I am asking that of the doctor. I had the doctor on out of order. I may say certain testimony that the mother will give relating to it—the doctor cannot come in the morning.

The Court: Are you asking the doctor if in his opinion the loss of the little finger and the scar will cause her mental distress in her association with school children?

Mr. Wood: And that there can be disadvantages in the association with children that would naturally flow from a situation of this kind.

The Court: Go ahead, Doctor, if you can answer.

The Witness: Well, I think it is inevitable just
 62 how she will react to it, how much she will have to endure depends on the handling of this child.

By Mr. Wood:

Q Exactly. Doctor, is there any operation that could be performed with any degree of certainty at this time on the right hand of Betty-Lynne that would improve the keloid scar condition as it now appears? A She should have the unsightly scar exised.

Mr. Canfield: That means cut out, doesn't it Doctor?

The Witness: Yes, cut out, she also has a functional disability in the metacarpal bone, the fifth bone, the fifth metacarpal bone, which could be removed and shaped down, and it should be done without too great delay while she is young and her tissues are pliable.

Q With reference to this plastic operation specifically relating to the keloid scar, would that have any guarantee to it that it would remove the keloid and that it would improve the child's appearance? A Well, all people who form these keloid scars are a group who cannot be identified, but they do form the keloid and once they do form a keloid, if they have a constitutional disturbance that is susceptible to some extent, preoperative and post operative, and the trouble diminishes, but there is a possibility of the keloid reforming where you form the new scar.

63 Q It is still possible for it to reform again? A It is not a complete assurance.

* * * *

Q Doctor, what would be the approximate cost of a plastic repair operation, including the hospital as well as the cost of the operation itself, the particular figure, as nearly as you can give it? A For this procedure on this patient?

Q Yes. A Oh, I should say seven hundred and fifty to a thousand dollars.

Q What was the value of your services other than the hospital to the child in this original operation up to the time you left the Navy? A I did not submit any bill.

Q Can you give us the approximate value of your services even though you did not submit a bill for them?

Mr. Canfield: I object, if the Court please.

The Court: If it was not paid for it cannot be recovered.

64 Mr. Wood: It is admissible to show the extent of the injury, if the Court please.

The Court: All right.

Mr. Wood: Even though both men were in the Navy there would still be an obligation on the part of Mr. Jacobsen to reimburse the doctor.

The Court: If there is, yes, I want to know it, but I understand no bill was submitted.

By Mr. Wood:

Q Were you permitted to engage in private practice also while you were in the Navy? A Yes.

Q What was then the value of your services?

Mr. Canfield: I object, if he rendered a bill that is one thing—

The Court: Did you have any understanding you were to be paid, Doctor?

The Witness: No, I did not, Your Honor, Mr. Jacobsen came to me after I had reentered private practice and I expected to be paid for that.

The Court: Of course, but I am talking about your service while you were in the Navy.

The Witness: No, no.

By Mr. Wood:

Q You did that because you were in uniform, 65 you were both in the Navy? A That is right.

Mr. Wood: The Court please, I think we are certainly entitled to give the value of his services, even though no bill had been rendered. That value can be shown as to what the doctor would have charged and what it was worth.

Mr. Canfield: If the Court please, I have no objection to Dr. Coffey stating that he expects to render a bill and expects to be paid.

The Court: Why, certainly.

Mr. Canfield: I think that is a proper element of proof. The other I object to.

The Court: Unless the doctor is to be paid for it, I don't see how it can be set up as an item to be recovered in this case.

Mr. Wood: Well, I want, if the Court please, whether the bill is sent to the plaintiff or not, you have a right to show value.

The Court: Yes, if it is to be paid, or if there is an obligation to pay it, of course, the value, and whether it has been paid or not makes no difference if it is an obligation, but if it was service rendered with no obligation to pay, then I don't see how it could be recovered as an item of expense.

By Mr. Wood:

66 Q After you left the Navy and reentered private practice again, what, if any change, did you make for your services from that time on?

The Court: That is all right, that is certainly permissible.

The Witness: I think, after that occurred, and I saw the child and treated the child on occasion and advised him regarding the subsequent care of the hand, I believe I submitted a bill of a hundred dollars.

* * * *

Cross-Examination

By Mr. Canfield:

Q Dr. Coffey, you made a written report of your work. On or about the 20th of February, 1946, at that time you recommended a plastic be done, did you not, a plastic repair on the keloid? A That is right, and that it be done without any unnecessary delay.

Q Delay, and that was two years ago? A I guess that is right.

Q You also recommended the improvement of the
67 head of the metacarpal bone at the same time? A
That is right.

Q And you indicated when that was done there would
be no functional disturbance of the hand other than the
loss of the finger, is that still true—let me read what you
say—plastic procedure will improve—

Mr. Wood: I think he is entitled to see his report if
you are examining him about it, I have a copy of it,
do you?

Mr. Canfield: That is what I am reading from.

Mr. Wood: Let the doctor read it.

Mr. Canfield: I was trying to hurry it, I will let the
doctor read the last part.

The Witness: Yes, I wrote that. I said in here that
after this operative procedure was carried out that the
functional capacity of the hand would be—would not be ma-
terially altered from its preoperative condition.

By Mr. Canfield:

Q That is what I mean.

The Witness: I meant this plastic procedure would
not do anything to materially alter the present condition
of the hand so far as function is concerned.

By Mr. Canfield:

Q The hand will get no worse? A That is right.

Q Than it is now?

* * * *

Frank R. Nymark

* * * *

Direct Examination

A Frank R. Nymark.

Q What is your occupation? A Commercial photog-
rapher.

Q With what company are you connected? A Leet
Brothers.

Q In 1945, were you connected with that same company? A Yes.

Q Did you at my request as attorney for the plaintiff in this case, make certain photographs at the Hecht
74 Company store of escalators? A I did.

Q I hand you these photographs, Mr. Nymark, that have been marked by the pretrial justice, and ask you if you recall having taken those photographs? A Yes, sir, I do.

Q Will you please refer to your record and tell us which escalator, by that, I mean whether it was the down or up escalator, and the particular floor? A This is a photograph of the down escalator which runs from the third to the second floor.

Q And the photograph or photographs were taken of what particular point on that escalator? A At the bottom of the escalator, the second floor.

Q Where the escalator meets the second floor? A Yes, sir.

Q Referring to Plaintiff's Exhibit No. 1 for identification—

The Court: Now, what one of the three?

Mr. Wood: This one, Your Honor.

The Court: That may be the one there, but I am talking about this particular one, you have already got one and two in evidence.

Mr. Wood: That was what I handed him.

The Court: Don't you think we had better give it a different number?

75 Mr. Wood: I do, Your Honor, we had better mark this 3.

The Court: That is right.

[The photograph in question was marked Plaintiffs' Exhibit 3 for identification.]

Q Referring to what we now have as Plaintiffs' Exhibit No. 3, I will ask you if that is a photograph you

took of the entire down escalator from the third to the second floor? A It is, sir.

Q Where were you standing with your camera when you took that with reference to the bottom of the escalator?

A I was standing on the second floor facing the escalator directly straight on.

Mr. Wood: I will ask the Clerk to please mark this as Plaintiffs' Exhibit No. 4 for identification.

[The photograph in question was marked Plaintiffs' Exhibit 4 for identification.]

Q I now hand you what has been marked Plaintiffs' Exhibit No. 4 for identification and ask you what view, that is, and where you were standing when you took it. A It is a close-up of the joining of the steps of the second floor level, it is made from the steps looking
76 at the escalator towards the floor.

Mr. Wood: I will ask the Clerk to mark this as Plaintiff's Exhibit No. 5 for identification.

[The photograph was marked Plaintiffs' Exhibit No. 5 for identification.]

* * * *

Q I will now ask you to look at what will be Plaintiffs' Exhibit No. 5 and ask you if it is a view of the same escalator, and if so, where you were standing when you took that picture. A That is a picture of the same location as the previous photograph, only this one is as you look into the escalator.

Mr. Wood: As you look into the escalator,—would Your Honor like to see these before I pass them to the jury?

The Court: All right, as I understand it, there is no objection?

Mr. Canfield: No objection—may I see those for a minute, I just want to orient myself.

The Court: Yes. [Handing them to Mr. Canfield.]

Mr. Wood: Perhaps it would be better to introduce

these two views and pass them on to the jury at the same time.

Mr. Canfield: I object to those two.

Mr. Wood: They were marked by the pretrial
77 justice with no objection at that time.

Mr. Canfield: You do not make your objections before the pretrial justice.

The Court: The question before the pretrial is a stipulation that at the trial they may be received in evidence without formal proof subject to objection as to relevancy. I mean, it is obvious that proof by the photographer is what you are really doing now, but it does not preclude other objections.

Mr. Wood: Yes, Your Honor.

The Court: And there were three photographs showing the escalator involved. I take it they were the ones that we have already passed on.

* * * *

The Court: I believe there were two photographs showing the escalator above the third floor, is that the one?

Mr. Canfield: I object to that.

Mr. Wood: I merely want the photographer to show the location from where he took that.

The Court: I understand there is an objection to that; maybe I had better rule on the objection. I mean, do you offer it in evidence?

Mr. Wood: I do offer it in evidence to show—

The Court: If you are going to discuss it, maybe
78 it ought not to be shown in the presence of the jury, come to the bench.

[Counsel for both sides approached the bench and conferred with the Court in a low tone of voice as follows:]

Mr. Wood: If the Court please, the defendant in this answer in this case has stated that the escalator in question was the usual and—

The Court: Customarily approved type.

Mr. Wood: Customarily approved type, and that it was safe for use, it was the ordinary way escalators were maintained by the same company from the third floor, and I think from the main floor to the basement. I will show later by other proof that there is a difference between the two, and that this escalator—it will be for the jury to determine—is a more modern type, safer for use, by merely looking at the photographs and by hearing the testimony with reference to the two. They are maintained in the same store, and therefore I think that they are relevant.

The Court: Well, it would be incompetent, would it not, to show that there is a type of escalator that is more—

Mr. Canfield: More modern.

The Court: More modern and safer.

79 Mr. Canfield: I know of no rule of law which says that we have to install each new type of escalator as it comes out, because you can get your fingers caught in these two.

Mr. Wood: Not as easily.

The Court: That is just the point. I think these photographs might have some bearing on it, because, while they may not in themselves be sufficient to show that—

Mr. Canfield: To save my point I will object to any testimony as to the difference there with reference to the escalators on the fourth and fifth floor, and on the ground, and I would like to ask this, as storekeeper, in complying with the duty to provide a safe place, are we expected to put in a new type of escalator every time one comes out?

The Court: No, but you are required to maintain safe and adequate escalators, and if one of them is dangerous, and if there is a more modern or less dangerous one available, it might be something to be weighed as to whether or not you ought to—

Mr. Canfield: That is the kind of testimony I object

to. I can find no authority to sustain that position. In fact, I find authority to the contrary.

* * * *

The Court: Maybe now is as good a time as any to go into that question.

80 Mr. Wood: Even though it may take a few minutes, maybe we better argue it.

The Court: Let the jury go out.

[At the conclusion of the foregoing conference counsel returned to the trial table and the trial proceeded as follows:]

[The jury retired from the courtroom.]

Mr. Canfield: I will have to send up and get some law books.

The Court: I can see where we are going to get into the thing, so we might just as well do it now even if we have to have some delay. How much time do you think it will take—fifteen minutes? If we recess fifteen minutes, will that give you time enough on that?

Mr. Canfield: I think so. I think I can go across to the library and bring them over.

The Court: All right, we will take a fifteen minute recess.

[Whereupon a brief, informal recess was taken at the expiration of which the trial proceeded as follows:]

The Court: All right, Mr. Canfield, you are objecting to the admission of this, so let's hear from you.

Mr. Canfield: May it please the Court, in order to present this intelligently we first have to determine
81 what the duty is that is violated in this case.

The Court: That is what I understand is the measure of it.

Mr. Canfield: The case that I rely on by analogy sets out what I think to be the comparable duty here, so, for good order, in presenting my argument, I will start with the first case, the case of *Wolf v. New Bedford Cordage* decided by the Supreme Court of Massachusetts—I do not

have the Massachusetts citation, but it is in 76 Northeastern at page 822. Before presenting the facts in this case let us see what the comparable and relevant facts are in this case. In this case here there has to be some breach of duty. What is the duty they owe? I take it to be Horn Book law that the only duty which this store owes to its invitees was to provide a reasonable and safe place for them to be while they are in the store on business or for any other purpose. That is the reasonable duty, and ordinary care is the whole measure of that duty.

The Court: I am not so sure about that. You may be right, but I mean, let's don't stress the point. My understanding is that it is the duty of the operator of an escalator the same as the duty of the operator of an elevator—

Mr. Canfield: Yes.

The Court: And the duty of an operator of an
82 elevator is to exercise the highest degree of care.

Mr. Canfield: In the operation of the escalator, not the maintenance.

The Court: Now there may be some point there, but I think this is deserving of some thought as to whether or not that does not comprehend the duty to furnish and to exercise the highest degree of care in the selection of the equipment.

Mr. Canfield: I will accept Your Honor's ruling when the time comes to consider passengers on an elevator, since the Court of Appeals in the Muncie Trust Company v. Webb ruled that the highest duty is owed to the passenger on the elevator and I think even, so far this case is concerned, escalator and elevator mean the same thing, because they are means of transportation in common use.

Of course, I have a good bit of law in the District of Columbia which holds that you do not owe the highest degree of care on either an elevator or an escalator because you can reject the carrying or transportation of passengers at your own will, without leaving yourself open to trouble—

The Court: It is not a common carrier in a certain sense of the word. Our courts have so held.

Mr. Canfield: That is correct.

The Court: It is not one within the meaning of the Fellow Servant Act, and that was the occasion for their
83 so holding. It was not a question of fellow servant—

Mr. Canfield: In the Muncie Trust Company case.

The Court: I think it was in the Muncie case, yes, or certainly in another case.

Mr. Canfield: They had a passenger who had his hand caught because the elevator did not reach the floor.

The Court: Well, in one of the cases it showed that a workman, who was going from one floor to meet another coworker and and the Court held that an elevator operator was also a coworker and that it was not taken out of the Fellow Servant doctrine because of his being a coworker, and that led to the confusion, that led to counsel to argue to me that it did not obviate the common carrier liability, the justices said they owed, namely, the highest degree of care.

Mr. Canfield: I won't duck the issue, but I should like to examine it more fully. I take the position so that there cannot be any question about it, as I understand the law to be, if you are a passenger on an escalator or an elevator in transit, in motion, then you owe the highest degree of care to that person while in transit, if you apply the *Muncie Trust Company v. Webb* facts in this case, but I say we are not dealing with that at this time, we are dealing with the
84 maintenance of their equipment, which we are asked to provide as part of the transportation facilities in our store. I say, if you take the principle and the rule of law that we learned in law school, which I still conscientiously believe to be the law, you only owe a degree of ordinary care, reasonable care and prudence in the maintenance, construction and supervision of the equipment or facilities in the store, designed to meet ordinary needs. It

is a reasonable degree of care you owe, as an employer to one of his employees. Now it is elementary Horn Book law, and you will find it in the Harvard Law Review which you have to quote in these days to get by—

The Court: Not necessarily in this court.

* * * * *

89 The Court: Now, Mr. Canfield, let me tell you
 90 what still remains in my mind. What you have said
 91 respecting the degree of care required of an employer to an employee is undoubtedly correct and sound. What you have said with respect to the duty owed by a particular storekeeper to a business invitee is, I think by analogy also sound. There is the duty to exercise reasonable care. What remains in my mind and not as well cleared up is whether that degree of care is the one that is applicable where in the operation of the duty owed by the operator of a passenger escalator or elevator—owed by the operator to a passenger on an escalator or elevator is the highest degree of care, whether that affects the degree of care required in the choice of the selection of the equipment with which to perform that function of carrying passengers. It seems to be open to some question, and when I use the term common carrier, I do not mean in any exact sense of the word, I mean it only insofar as it demands the highest degree of care when a common carrier is required to exercise all the skill and foresight within reason to prevent injury to passengers, and I am wondering if that skill and foresight does not require him to—I am wondering if he is not required to exercise that same skill and foresight in the selection of the equipment with which to perform that function.

Now you say the store ought not to be required to adopt the most modern escalator type unless it can be
 91 shown that it would prevent an accident.

I do not think that a common carrier is called upon to prevent an accident. He is not an insurer. All that I think he is required to do is to exercise that reasonable

skill and foresight within reason which would prevent an accident, but I cannot quite see how such a carrier can fulfill his duty by merely selecting a means which are allegedly less apt to prevent an injury than another type. Now I am not too certain in my own mind about the duty the store had, that a man has got to put in new equipment. That is to say, I am not saying definitely what my thoughts are in the matter, but I am trying to point out to you what I think are the considerations that ought to be considered. I would like to know what the rule is with respect to — not where reasonable care is required, but to provide a safe place to work for employees and whether the duties that rest upon a common carrier with respect to the selection of the instrumentality that they use —

Mr. Canfield: I wonder, if Your Honor would ask Charles to go to get the *Muncie vs. Webb* case, it is 37 Appeals, but I cannot recall the page. It went to the Supreme Court.

The Court: You want 37 Appeals D. C.?

* * * * *

93 Mr. Canfield: Will Your Honor permit me just a second to refresh my recollection on the *Muncie* case?

The Court: Yes, do it. I am confident that this was not the last escalator case I had, in which I have erroneously said there had been an abandonment of the doctrine of *res ipsa loquitur*. I cleared that up this morning. There was not an abandonment of it, but in that case — I referred there to one of the cases cited to me by counsel for both sides, and I came to the very definite view that while our court had distinguished between a common carrier and an elevator operator, it was on the basis of the fellow servant relationship, and they reiterated the existence of the duty of the highest degree of care.

* * * * *

94 Mr. Canfield: No, the Southern case — this is
 37 Appeals. The Southern case is 57 Appeals. Judge Arnold wrote the opinion in that case where a person in the Medical Building stepped off the floor and there was a self-operating elevator, and as I recollect, this person had reached the floor and was in the act of stepping out and somebody pushed the button below and in getting in — there was some discussion there as to the degree of care. I think the Court of Appeals there held that it turned out that something went wrong with the mechanism, it was a case of the highest degree of care, since the passenger was still on the elevator.

The Court: There are three cases — I never can remember them by name, I do know that the Muncie case and the Southern case were two of them. Now there is a third one that came along even after the case which had differentiated the elevator carrier from a common carrier, and repeated their holding that had been made in an earlier case by Judge somebody or other saying of course that was the law, that the highest degree of care, in fact, it starts out, this opinion that there can hardly be any situation where a higher degree of care would be required than of one who operates an elevator.

* * * * *

97 The Court: I think this Southern case is the one
 I had in mind or the *Muncie v. Webb* case that
 98 started out with the proposition, actually said in the first headnote:

“One who owns and controls a building used for business purposes, and equipped with passenger elevators, is a carrier in the transportation of passengers using the elevators by his invitation, and while he is not an insurer of their safety, he is required to exercise the highest degree of care and diligence for thir safety; and it is doubtful if there is any known method of conveyance in which a higher degree of care is required.”

Now they come along in the Southern case and say that the operator of an elevator is not a common carrier and, as I said, that turned on the Fellow Servant doctrine because of the fact that with respect to common carriers the Fellow Servant doctrine is abrogated. They say it is not a common carrier, therefore it is not abrogated, but it does go on to say:

"It is undoubtedly true that the same high degree of care is required for the safety of passengers by the operator of an elevator in a public building as is imposed upon a common carrier." [Citing *Muncie v. Webb* the Court goes on to say,] "We said, 'It is important at the outset to consider the duty which defendant owes to persons entering his

99 building for legitimate purposes, and using the elevators placed therein for their accommodation. The building in question is a business block devoted to public use. The elevators are an essential part of the building, and persons using them do so by the invitation of the defendant. It follows, therefore, that defendant in this instance is a carrier engaged in the transportation of passengers. While not, in the strict sense, an insurer, he is required to exercise the highest degree of diligence and care for the safety of persons using his elevator as agencies of transportation. It is doubtful if there is any known method of conveyance in which a higher degree of care is required in its construction and operation than that of an elevator'."

"In *Mitchell v. Marker*, C. C. A., 62 Fed. 139 and other citations, where a passenger in an elevator in a public building was injured by the alleged negligence of the operator, Mr. Justice Lurton, speaking for the court said: 'We see no distinction in principle between the degree of care required from a carrier of passengers horizontally, by means of railway cars or stage coaches, and one who carries them vertically, by means of a passenger elevator. The degree of care required from carriers by railway or stage coach is the highest degree. Neither is an insurer, but, in regard to

each, care short of the highest degree becomes, not
100 ordinary care, but absolute negligence.' "

I don't see how there can be any question but what that is the law in the District of Columbia.

Mr. Canfield: Whether I like it or not, I reconcile myself to the fact that if one is on an elevator or escalator —

The Court: Yes.

Mr. Canfield: We owe him the highest degree of care while he is on that elevator, but that is not the point here. The point here is that it is an element of negligence to go to the jury that because there is a more modern appliance, to-wit, an improved escalator, —

The Court: I agree with you that that is not entirely dispositive of the question, but there is another point. Now my question is this, does one owing the highest degree of care to a passenger fulfill that duty by exercising only ordinary care in the choice of the mechanism that he uses.

Now, here, even under the ruling of the Court, though it is repeatedly insisted that that was not the point here under consideration, but Mr. Justice Van Orsdel does use the language "in which a higher degree of care is required in its construction and operation than that of an elevator."

Now then the question still remains as to whether or not that highest degree of care is fulfilled by the choice of the instrumentality that does not minimize as greatly as
101 it can be minimized the hazards —

Mr. Canfield: It goes farther than that, it is not so much the choice as the duty.

The Court: Yes, I agree with you.

Mr. Canfield: In the Muncie case it was the most modern, the most up-to-date appliance on the market —

The Court: Yes, now I do not think we have gotten to that point. That is what I am talking about, we have gotten to it — when I say we have gotten to it, I mean in the authorities that we are discussing we have gotten to it insofar as duty required of a person owing ordinary care, but have we reached the judicial decision on the question of whether the highest degree of care is required. Now it

might be, as you say it is, that the exercise of the highest degree of care at that particular moment fulfills the duty, and that there is no subsequent duty to tear it out and put something better in, and I am not expressing an opinion on that, but I am saying that it looks to me like it is bottomed on something —

Mr. Canfield: Well, I must say candidly I have no other authorities at this time. My bright boys in the office who do this work for me supplied this information to me, and I cannot tell Your Honor I did any independent research on it.

The Court: But you do see the point I am making, don't you?
102

Mr. Canfield: Yes, I do. I don't agree, but I see the point.

The Court: I am not asking you to agree. In fact, I would rather be surprised — I would expect you to disagree, at the same time I do want to explore all phases of it.

Mr. Canfield: I am going to have to have some time. Of course, I doubt very much if we can possibly finish the case today.

The Court: No, I don't think we can. [At this point Mr. Canfield made an explanation off the record.]

The Court: I am afraid you are not going to be able to explore the cases over the week end.

Mr. Canfield: I will put my boys to work on it.

The Court: Suppose you do that then unless you have got something positive —

Mr. Wood: I think this answers the situation that we have in this case. My view is simply this, in this particular case, first of all we start off with, not a case where the plaintiff is endeavoring to introduce a better type, a newer type, a more modern escalator in Woodward and Lothrop as compared with what the Hecht Company has in its store.

We must keep in mind, therefore, it is in their store
103 where we had this comparison to meet in this particular case. It serves to accentuate and demonstrates

beyond any doubt the inherent danger in the escalator in question here, that it is a dangerous instrumentality.

* * * * *

Mr. Wood: So consequently the highest degree of care does apply. We have no doubt under the Southern Railway case that they must, even where the highest degree of care is owed, where there is a public building, the person who owns it is simply a common carrier, there cannot be any doubt. Our own D. C. decisions dispose of that, consequently that being so, we have the relevant fact to start off with, and in addition to that we have here a defendant that has the knowledge that there is a newer means and safer than the old one, and he so told Your Honor.

The Court: I will not assume that, til we get back
104 to the narrow question, Mr. Wood, does this duty of exercising the highest degree of care to a passenger lay a duty upon the operator to discard that equipment which we will assume was the best obtainable at the time it was installed, in favor of better equipment when it becomes available? Now that is the narrow question.

* * * * *

Mr. Wood:

107 Now our position in this case is simply this, it makes no difference as far as the duty owed by the Hecht Company is concerned whether the Hecht Company would have to remove this escalator there from the main floor to the second floor and the second to the third floor, if they were known to be dangerous, then they have got to use every proper care, and the highest degree of care—whether it was ordinary or not, the same rule would apply, they have got to use every precaution in the case of danger known to exist, and that they did not do that and remove that machinery, that dangerous machinery—

The Court: Yes, but that evades the question. If the escalator that was in use was dangerous it ought not to have been used, it ought to have been stopped. I agree with you,

I believe even Mr. Canfield will agree with you.
 108 That is not the point that I am faced with. The question is should I admit photographs showing a different type of escalator, a more modern, and we will concede for the purpose of argument, a less hazardous to the users of it. Now that is the thing we are up against. Of course, if the escalator is dangerous the Hecht Company is liable, and whether they put in a different kind of escalator or not has got nothing to do with it. They should not be operating it if it is dangerous and they should have put guards there to keep people from using it and keep children from using it, but the narrow question here is is the operator of an escalator a common carrier, and thus the highest degree of care is required to be used, to make use of the more modern and safer equipment as and when such equipment becomes known and available for use.

Mr. Wood: In answer to that I say to Your Honor that if he knows one is dangerous, it makes no difference.

The Court: I agree with your reasoning there, it makes no difference whether I let the photograph in or not, it depends intrinsically upon the danger of the old in comparison with the new.

Mr. Wood: The point is, Your Honor, what I am trying to show you, make it clear to you is that in a negligence case, because the burden of proof is on the plaintiff to give
 109 evidence which will demonstrate the pertinent and relevant facts of the issue and disclose negligence on the part of the defendant, and Horn Book law, as Mr. Canfield has said —

The Court: I agree with you, Mr. Wood, but please keep this in mind, there cannot be negligence unless there is a failure to comply with the duty that is required by law. I mean, that is what negligence is. Now the query we are faced with here is, is there a duty upon the operator to get more modern and improved equipment as and when it becomes available.

Now you have shown, and I will assume that that is correct, that the escalators on the other floors are more modern and less hazardous. The query, was there a duty upon the Hecht Company to put that type of escalator in between the second and third floors?

* * * * *

111 The Court: Let me be Mr. Canfield's advocate for this moment — I have been arguing your case with him, without defense to anything that Mr. Canfield can say that in all good conscience, when they put these escalators in, that they were the best that were known, and they conformed to the requirements of the higher authorities of the District of Columbia and they constantly are inspected, and they passed inspection; he could say that they fulfilled the requirement of the duty that is placed upon them. Now I am trying to make out the basis of your contention that that is not enough, if there is a safer, better means, but just simply to say so is not going to convince me.

112 Mr. Wood: I think in the Southern Railway case — I will try to find it, it even goes further and it says where you have a duty to comply with the highest degree of care as when you are operating an elevator or an escalator, that you are in duty bound to select materials and put them together under the highest degree of care that could possibly be known to prevent accidents.

The Court: Have you got that case?

Mr. Wood: I will have to look further — I don't know whether it is quoted in there or not, but it even goes on in the selection of material —

The Court: Suppose you get that when we take the matter up again. I am going to reserve ruling on the two photographs.

Bring the jury in.

[The jury returned to the courtroom.]

The Court: Let them be marked 6 and 7 for identification.

[The photographs in question were marked Plaintiffs' Exhibits 6 and 7 for identification.]

Mr. Canfield: You are not going to present these now?

The Court: If there is any identification necessary with this witness, go ahead, do that, and I will withhold ruling on their admissibility.

Thereupon

113

Frank R. Nymark

resumed the stand as a witness for and on behalf of the plaintiff and, having previously been duly sworn, was examined and testified further as follows:

Direct Examination — Resumed

* * * * *

Q I hand you what has been marked Plaintiffs' Exhibit No. 6, and ask you if you will please tell what that depicts.

A Yes, sir, it is a close-up of that part of the escalator which runs from the fourth to the third floor; the down escalator.

Q. The down escalator from the fourth to the third floor? A Yes, sir.

Q Where were you standing, what position were you in when you took that picture? A On the third floor looking into the escalator.

Q On the third floor looking into the escalator.

I hand you what has been marked Plaintiffs' Exhibit 7 for identification, and I will ask you if that is a photograph of the same escalator that you have just described. A Yes, sir, it is.

Q Where were you standing when you took that? A On the steps, looking at the escalator.

114 Q When you say "on the steps" you mean on the down escalator from the fourth to the third floor looking up, is that right? A From the fourth to the third floor.

Q From the fourth to the third floor, looking at the escalator? A Yes, sir.

Q Do you recall how high up on the steps you were from the bottom? A On the second floor step, I believe about —

Q So you could show the bottom part of that escalator where it meets the third floor, is that right? A Yes, sir.

Q Mr. Canfield wants to know how these others were taken — these have already been introduced in evidence as Plaintiffs' Exhibits 1 and 2 — Mr. Nymark, you took those, did you not? A Yes, sir.

The Court: Not 1 and 2 unless it is of the hand.

Mr. Wood: That is right, that is what they are.

The Court: Of the hand?

Mr. Wood: Yes, Your Honor, I am merely establishing the date — Mr. Canfield wanted that yesterday.

The Court: All right.

By Mr. Wood:

115 Q Did you take those two photographs, Mr. Nymark, by request of the attorney for the plaintiffs?

A Yes, sir.

Q Will you please tell us the date you took them, from your record? A They were made the 26th of November, 1945.

Mr. Wood: I think that is all.

Mr. Canfield: I think I better cross-examine. Are you going to exhibit the other pictures to the jury —

The Court: What do you mean the other pictures — 6 and 7 have been objected to and the Court reserved ruling on them.

Mr. Canfield: That is right.

The Court: So they won't be exhibited at this time. Now 3, 4, and 5 have been admitted and may be exhibited.

Mr. Canfield: But they have not been established yet.

The Court: No, just a matter of convenience only.

Mr. Canfield: Shall I cross-examine on those at this time or wait. Maybe I better cross-examine now.

The Court: That is right.

Cross-Examination

By Mr. Canfield:

Q Mr. Nymark, these exhibits No. 1 and 2, which are pictures of the injured hand, you said you took them
116 November 26? A Yes, sir.

* * * * *

117 Mr. Wood: That is right.

By Mr. Canfield:

Q Plaintiffs' No. 3, 4, and 5 for identification, No. 3 is a picture made from the second floor of the Hecht Company looking up the escalator, is that right? A Yes, sir.

Q Was the escalator stopped by somebody in order for you to make that picture? A Yes, sir.

Q The man going up or coming down this — do you know who he is? A No, sir, I don't know who he is, simply a casual man, he was there, a lot of traffic was there in the morning.

Q How far back from the comb plate of the escalator was your camera? A I didn't measure that either; I can estimate it.

Q That is all right. A Probably twenty feet.

Q Twenty feet back? A Yes, sir.

Q Does it give you the full head of the escalator; have you got that space in there? A I cannot be sure, sir.

Q Is that a step? A Yes.

118 Q That shows the 23 steps in the picture. A Yes.

Q Can you tell us whether or not there are more steps? A No, sir, I cannot.

* * * * *

120 Mr. Wood: If the Court please, I think, in view of Mr. Canfield's cross-examination it might be proper at least, I want to show that these pictures were taken pursuant to a motion filed under Rule 34 asking permission to take them of the Hecht Company, and who

granted permission. We were there by reason of a court motion.

The Court: All right.

Mr. Canfield: You were there because you asked me for permission and I said, "Sure."

Mr. Wood: After the motion was filed you agreed.

* * * *

121 *Redirect Examination*

* * * *

123 By Mr. Wood:

Q In your examination of the steps in 4, if the step were in the same position as shown in 4, Plaintiffs' 4, that break showing the portion between the two steps is a definite open space between the two steps, is it not? A Yes, sir.

* * * *

2 A *Helena Jacobsen*

* * * *

Direct Examination

Q Will you please state your full name? A Mrs. E. S. Jacobsen.

* * * *

Q Where do you live? A In Provo, Utah.

Q Where did you live on November 15, 1945? A Arlington, Virginia.

Q How long before that had you lived in or near Washington? A Twelve years, approximately.

Q When did you leave or go to Provo, Utah? A Two years this coming August.

Q You then lived in Washington prior to that time for a period of about 12 years? A That is right.

3 A Q Now, prior to November 15, 1945 did you deal with or have occasion to be a customer of the Hecht Company store? A Yes.

Q How long prior to that date, November 15, 1945 had you been a customer of the Hecht Company store? A Do you mean the entire time—ten years, approximately.

Q Prior to 1945? A Yes.

Q You are the mother of Betty-Lynne Jacobsen, are you not? A Yes.

Q I will ask you whether or not on November 15, 1945 you had occasion to go to the Hecht Company store? A Yes I did.

Q What time did you get there? A About ten o'clock in the morning.

Q With whom did you go? A With my two daughters, Geraldine and Betty-Lynne.

Q How old was Geraldine at that time? A Seven.

Q How old was Betty-Lynne at that time? A Three.

Q Three, about when would she be four? A Her birthday was the 5th of December.

4 A Q About what time did you arrive at the Hecht Company store? A About ten o'clock.

Q Do you recall what entrance you went in? A The 7th Street entrance.

Q Upon going in what did you next do? A I went up to the second floor as I recall.

Q To the second floor? A And then further on to the 3rd floor.

Q What did you do on the second floor at that time? A I attempted to make a purchase for my older daughter.

Q Did you make that purchase? A No, I didn't, they didn't have the merchandise I was seeking.

Q What were you attempting to buy? A A pair of leggings.

Q After that you went to the third floor? A That is right.

Q What, if anything, did you do on the third floor? A I purchased a Brownie dress for my eldest child and the children visited with Santa Claus.

Q Where was Santa Claus located? A As nearly as I can recall, to the east part of the store.

5 A Q On what floor? A On the third floor.

Q Did you see Santa Claus with your two daughters? A Yes.

Q Before or after the purchase of the Brownie dress?

A After.

Q You immediately purchased the Brownie suit for the older girl upon going to the third floor, is that right? A Yes.

Q What was your purpose in going to the Hecht store in the first place? A To buy a Brownie suit and a pair of leggings for my eldest daughter and to get some underwear for my second daughter who was with me.

Q Did you have in mind seeing Santa Claus also? A No, I didn't know he was in the store on the day we went in.

Q How long were you on the third floor, approximately? A Not very long, just a very few minutes.

Q Just a very few minutes. Had you made any purchases other than that, up to that time elsewhere in the store? A No.

Q After you were through on the third floor what did you next do? A I went to the escalator and started to proceed down—at that—.

Q When you say escalator, was it a down or up escalator? A It was a down escalator.

Q Where were you going? A Down to the second floor.

Q For what purpose? A To find some underwear for my second child.

Q Had you been in the Hecht store before that day? A Oh, yes.

Q Had you made any purchases for your children prior to that? A Yes.

Q Where was the Children's Department located? A On the second floor.

Q Tell, in your own way, what you did as you got to the down escalator, as you have stated, from the third to the second floor? Tell the Court and jury just what occurred? A I took my two children with me. The elder one got on the escalator by herself; the smaller child I had hold of her hand. We got on the escalator and went down approximately one-third of the escalator. At that time Betty-Lynne very impulsively broke away from me and proceeded on.

Q At the time she broke away from you, state whether you did anything to prevent her from doing so or
7 A to bring her back? A I attempted to get her back but she sped on a few steps ahead of me.

Q Who, if anyone, was in front of you? A There were people on the escalator. There was not anyone immediately, as I recall on the step ahead of me but there were people going down the escalator.

Q What, if anything, did you do with reference to changing your position, if at all, after she impulsively pulled away from you? A I pulled over to the other side of the escalator, and followed her down as soon as I could. There were sufficient people in front of me that it was not easy to go on down the escalator.

Q Will you tell us prior to that time whether your older girl Geraldine who you say was seven at that time had been on escalators before that? A Yes she had been, with me.

Q Tell us what, if anything you had done concerning the use of escalators by Geraldine prior to that time?
A I had instructed her to put her hand on the rail and hold on carefully to the rail, and generally I held her hand myself.

Q Now after you got down to the point you have
8 A stated and Betty-Lynne pulled away from you and did what you have stated, what next occurred? A When Betty-Lynne neared the bottom of the escalator and I was eight or ten steps in back of her, she fell.

Q What caused her to fall, if you know? A As nearly as I know, the movement of the steps as they moved and carried her down, she lost her balance, and fell.

Q In what position did she fall, where was she when she fell? A In falling it pivoted her around; she fell at the bottom of the escalator where these steps break into the floor.

Q What position was she in; where was her body with reference to the moving portion of the escalator? A As nearly as I can say, part of her hips were on the floor, her side and chest were across the moving part of the steps.

Q What did you see her next do after that, if anything? A She put her hand down and immediately I saw a panicky look come on her face. I knew that she was hurt. I tried to get to her but the people on the escalator were sufficient so that I could not get to her.

Q Yes, proceed. About how far away from her
9 A were you when you saw that look on her face? A Not more than four or five steps.

Q Which hand was it she put down? A Her right hand.

Q What was she doing when she put her hand down?
A I assume she was attempting to help herself up.

Q Then what next did you do? A As soon as I could reach her I bent over and tried to help her up and I immediately found that her hand—I saw and felt both that her hand was caught—I could see—

Q Where was it caught? A Caught in the escalator where the fingers of the escalator come out and the steps ride in as it goes underneath the floor.

Q When you say "the fingers of the escalator" do you mean the stationary part on the floor? A The exact portion that I speak of is where the steps ride under, it is stationary.

Q It is stationary where the moving step meets and goes under? A That is right.

Q At what point of the step do you recall that her hand was caught? I mean by that with reference to the step itself, the stationary fingers of the comb plate
10 A as it goes under the floor? A That is right.

Q To the right of it, the left of it, the center or where? A To the right as you go up the escalator. Her hand was a few inches from the rail on the side.

MR. WOOD: I think, if the Court please that I would like at this point for the jury to get a view of the pictures already in. I may want to use them.

THE COURT: All right.

BY MR. WOOD:

Q Will you please step down, Mrs. Jacobsen and point out for the jury on plaintiff's Exhibit No. 3—stand over here so they may all see it—will you please point out the approximate location where the hand was caught? You said it was between the moving steps and the comb plate?
A It would be approximately here (indicating).

Q Approximately right there, the escalator in motion with the step moving and engaging in it would be about that location, is that correct? A Yes, that is right.

MR. CANFIELD: Will you have her mark that?

BY MR. WOOD:

Q Point out to the jury—right here I think you said—approximately how many inches from the right side
11 A going up the escalator? A As you go up the escalator it would be three or four inches from the right hand side of the banister.

Q What do you mean when you say "banister"? A I mean the side of the escalator.

Q It would be that part of the rail? A Approximately.

Q Thank you. Point where the hand was caught, as you say you both saw and felt? A Right about here (indicating).

MR. WOOD: Do you want her to mark on it now?

THE COURT: Yes.

BY MR. WOOD:

Q Will you mark on there the approximate location?

A Is this the stationary part (indicating).

Q That is the step that moves—Mr. Canfield you may come in here and see it with me. This is the comb plate, this is the moving step that was moving into the comb plate—this is the comb plate right here. A I would say approximately right there (indicating).

Q Would you say that is about how many inches from the side? A Three or four or five inches; in the picture, of course, it is difficult to say.

Q So that the mark you put on there you meant
12 A by that that the mark is about three or four inches from the right side of the escalator, going in. A The escalator, itself, does not show up on that picture.

* * * *

BY MR. WOOD:

Q Will you please tell us, Mrs. Jacobsen, after doing what you told us you did, as you got to her and took hold of her wrist, will you please tell the Court and jury what next occurred? A I immediately tried—I immediately did call for help, but the movement of the steps of the car coming down and the motion itself, in some way I was thrown from the escalator out into the floor near the show cases. I picked myself up and called again for help, at the same time trying to get back to the escalator and looking for some kind of a stop to stop the escalator and I also perceived that the steps were still moving.

Q Were you able to see the stop button? A I was not.

Q Why not?

MR. CANFIELD: I object—I will withdraw the objection.

THE WITNESS: I could not find it. I looked for it but it was not obvious to view.

13 A BY MR. WOOD:

Q You could not find it? A No.

Q Before that time did you know of your own knowledge where it was; had you been told by any official of the Hecht Company? A No, I had not.

Q What did you next do? A I made three different attempts—I called three different times for help—made three different attempts to get to the escalator and my child but was not able to.

Q Why weren't you able to? A There was a crowd of people assembled around the escalator.

Q What did you next do? A At that time I saw a gentleman coming in from the opposite side of the escalator and push his way through the crowd and get to the steps, as they were slowly coming to a stop.

* * * *

14 A BY MR. WOOD:

Q At the time he came from the opposite side, as you say, was the escalator still in operation and moving? A As nearly as I can judge it was coming slowly to a stop. I am a little hazy on that. I don't know whether it had actually stopped or was coming to a stop.

Q Can you estimate the time from the time you first called for help when you leaned over the escalator, why didn't you come to your daughter? A I could not be sure.

Q From the time you first asked for help, as you have stated, until the escalator actually stopped? A I cannot estimate that time in a matter of minutes or seconds, but I can tell you this—

MR. CANFIELD: If the Court please, she has answered the question. I object to any further answer.

BY MR. WOOD:

Q Can you estimate the time in any other way? A Yes, I can estimate it in this way: it took as long as it would be for me to be somersaulted out on to the floor for me to call for help three different times in between time calling for help and attempting to get back to the

escalator and trying to find the stop in order that I myself might stop the escalator.

Q Well, can you tell us from that whether the
15 A escalator was or was not eventually turned off? A
It was not.

Q After it was stopped, and you say it came to a stop what did you next do, if anything? A At that time this gentleman who came in from the side picked Betty-Lynne up.

Q Where were you then when he did that? A I was still by the escalator, out on the floor.

Q What then did you do? A He started to carry her up the stationary steps which were not moving, the crowd separated when he was carrying the child up the steps.

Q Where did you then go? A We went to the First Aid room, I believe, he took her to the First Aid room.

Q Who carried Betty-Lynne? A He carried Betty-Lynne.

Q Where was the First Aid room, if you recall? A As nearly as I can recall, it was on the Fourth Floor.

Q When you got there, what did you do, who was there? A There were two men there—I don't know whether there was a woman there, but Betty-Lynne was the first name sent up to the First Aid room, and I
16 A followed her up, and they took her hand up, and then it was for the first time I discovered the real extent of her injury.

Q What did you see? A Her finger was hanging down this way (indicating) from her hand; the back of her hand was badly mutilated, very bloody, covered with blood and bleeding very badly.

Q What was her condition otherwise there as you observed it? A She was very white, she was screaming all the time, as soon as she was picked up she stopped crying, she was very very pale and I expected to see her pass out any minute.

Q What, if anything was done, in the First Aid room by anyone other than yourself? A The nurse bandaged her hand, and administered first aid to her hand, and I went up to the doctors and made arrangements to go to the hospital.

Q What hospital? A Children's.

Q Did the gentleman who carried her up remain there? A That I am not sure. There were two gentlemen there but I don't know whether the one who carried her up remained there or not.

Q Now, on that day, Mrs. Jacobsen before you used any escalator and particularly this one in question from the third floor down to where the accident occurred, 17 A did you see any signs at this or any other location near the escalator forbidding children to use the escalators? A I did not.

Q Did you see any signs instructing you as a mother of children how to use the escalators? A There were no signs of any kind.

Q On any of your trips to the Hecht Company prior to this had you observed any? A No, I had not.

Q Had you ever been told anything by any official of the Hecht Company concerning the use of the escalators by yourself and the children? A None at all.

Q You, on that day, as I understand it, did not go above the third floor? A Not on that day.

Q Now how long did you remain in the First Aid room with your daughter approximately? A Oh, twenty or thirty minutes I guess, I don't know.

Q Then what did you next do? A We went in our car—one of the officers in the meantime had called my husband and told him he should go to the Children's Hospital.

Q When you say, we went in our car, who do you 18 A mean by that? A One of the men that was in the First Aid room, the nurse, Betty-Lynne and I.

Q Who else? A That was all.

Q Where was Geraldine? A She did meet us in the First Aid room.

Q Did she go to the Children's Hospital with you? A Yes.

Q You went from the Hecht Company store directly to the hospital? A Yes.

Q About what time did you arrive there, if you recall? A About ten thirty—I mean around eleven o'clock, I imagine.

Q What was done that you observed and saw that you have knowledge of at the Children's Hospital? A Well, we went into the Dispensary and were admitted to the hospital and I heard the doctor who had unbandaged the child's hand—he immediately sent her to the operating room and took care of the injury in the operating room.

Q What next happened after that? A Well, after she was returned from the operating room into the room where she was I stayed with her there the rest of the day.

Q Prior to that, what doctor if you know, did 19 A perform the operation? A Dr. Robert J. Coffey.

Q Did you know him before that day? A No, we didn't.

Q Did you have anything to do with the arrangements for his operating on that day?

MR. CANFIELD: If the Court please, I don't want to object, I don't see where it is material, I don't press a very serious objection except that I see no reason to take the time.

THE COURT: Has it any materiality?

MR. WOOD: No, except to show that the arrangements were not made by her.

THE COURT: All right, go ahead.

BY MR. WOOD:

Q You did not make the arrangements directly yourself? A No, my husband made the arrangements for Dr. Coffey.

Q What was your daughter's condition after the oper-

ation when she was brought back to the room shortly after that? A She was under the influence of an anesthetic for the greater part of the afternoon. She came out of the anesthetic all right and remained in the hospital for some time.

Q How long did she remain in the hospital? A Five days.

Q Then after—well you visited her at the hospital, of course? A I stayed at the hospital with her.

Q You stayed there? A Yes.

Q Who continued treating her; by that I mean what physician? A Dr. Coffey.

Q When she left the hospital you took her to your home where? A In Arlington, Virginia.

Q What was her condition then when she arrived home? A It was good.

MR. WOOD: If the Court please, may I at this time have Mrs. Jacobsen point out to the jury the hand where she saw it was caught?

THE COURT: All right.

MR. WOOD: Will you please come up, Betty-Lynne?

(The child comes up to Mr. Wood.)

BY MR. WOOD:

Q Will you please step down, Mrs. Jacobsen close to the members of the jury in order that all of them may see it and point out to the jury right there where the child's hand was caught and the injury done to it? A Her hand was caught in such a way that the small finger was taken off there. There had to be several stitches taken in the knuckle, there were several stitches taken in this finger; this finger was caught and the back of her hand was torn wide open.

Q Which finger of the hand was it? A As I say, it was the little finger.

Q What was it hanging by, if you know? A Skin, as nearly as I can recall, I don't know if any muscles were there or not.

Q Will you step up a moment to the jury box and show that to the jurors? A The finger was amputated, and this one had several stitches in it right here; this finger was ripped several times and the back of her hand was torn wide open.

Q Will you please repeat that so that these jurors here may also see? A This finger was amputated here (indicating). There were several stitches taken in the knuckle; there were several stitches taken here. This finger was ripped and the hand was torn wide open.

MR. WOOD: Betty-Lynne, will you please stand over there.

MR. CANFIELD: May I have her close her hand in front of the jurors?

MR. WOOD: Please stand right here and hold your hand up. Now close your fingers.

(The child does as requested.)

22 A MR. WOOD: Now will you turn your back and do the same thing—that is right.

Is that all right?

MR. CANFIELD: Yes, thank you.

MR. WOOD: You may walk back and you resume the stand, Mrs. Jacobsen.

BY MR. WOOD:

Q Was she confined to the house after you took her back from the hospital, Mrs. Jacobsen? A To a certain extent I kept her in the house and watched her closely for about a week after we had her home.

Q Then who continued treating her, if at all, after you took her home? A Dr. Coffey continued treating her for approximately three months.

Q How long did you remain in Washington or Arlington after that? A Until August two years ago.

Q August of '46? A That is right.

Q And that is when you moved to Provo, where you now live? A That is right.

Q Will you tell us whether the little girl, Betty-
23 A Lynne, has been in school the last year? A Yes, she has been in kindergarten.

Q Where? A In Provo, Utah.

Q Will you tell us, from the time she came home up until the time she started to school, with reference to the use of her right hand, what, if anything, you have observed? A Immediately after the bandage was taken off she had trouble in getting used to this finger, it was stiff, it didn't bend, and for quite some time there was a question as to whether the tendon was mashed so that she would not be able to use it, but through exercise, massage, etc. she did get the use of that finger. She protected her hand constantly, and still does, because at times it is very sensitive, the stump was hit considerably, and it is very sensitive, even now.

Q In the course of the period of time, since about the 20th of November, 1945, when you took her home from the hospital until the present time, according to your own personal knowledge, has she played as you have indicated, because they have stopped on many occasions? A She has, on many times when playing—naturally, she would play with other children, it has happened very many times.

Q Is it your desire and has it been, that she play
24 A the piano? A Yes, I would like her to.

Q Has she made any attempt under your own instructions to play the piano? A Yes, I have helped her a little.

Q Does she have difficulty with her right hand in attempting to play it, or not? A Naturally, she has to use the fourth finger for everything the little finger would do on the piano.

Q In playing with her playmates out in Provo, Utah and in playing with them here in Washington before she left in August, 1946, state whether or not you know of any difficulty she has had in her relationships with other playmates in the neighborhood?

MR. CANFIELD: I object to that as speculative.

THE WITNESS: She has encountered—

THE COURT: I will let this witness tell anything she has observed.

BY MR. WOOD:

Q Confine yourself to what you have observed yourself.

A The children sometimes do not care to hold her hand in playing "Ring around the rosy", and other games. I have noticed the children withdraw and asked not to hold her hand. It seems impossible for them to play in a game and hold her hand, and they would get somebody else.

25 A Q State when she started to school. A September this past year.

Q 1947? A Yes.

Q State what, if anything you did with reference to her injured hand, particularly with reference to her entrance in the school. Don't say what anybody else said to you but just state what you did. A I went to the teachers and explained the injury and the handicap I had noticed in the past and asked them to be on their toes and be alert to handle the situation.

Q Don't say what they told you but say what you learned or understood was done, if anything was done?

MR. CANFIELD: Wait a moment, that obviously would be hearsay.

THE COURT: Yes, I don't understand what you mean by "understood".

MR. WOOD: I didn't mean to relate—just have her state whether her request was complied with.

THE WITNESS: Yes, it was.

BY MR. WOOD:

Q Since being in school, state of your own knowledge whether Betty-Lynne was exposed to any psychological handicaps, and if so, what occurred, to your knowledge?

MR. CANFIELD: I object to that, if the Court please.

THE COURT: I am afraid that question is a little too general. She can say what she has observed.

* * *

A I saw a personality complex.

MR. CANFIELD: That is the same question, if the Court please.

THE WITNESS: It was brought—I noticed myself that Betty-Lynne was—

BY MR. WOOD: What did she do? A Well,
27 A she didn't want to go to school; she didn't want to have anything to do with the children because they were making fun of her hand.

Q What did you do about that? A I talked to her about it and I went to the teachers to find out what was going on.

Q Was there something again done at your request about that? A Yes, there was.

Q Has there been any similar experience occur with the neighborhood children out in Provo with whom the child plays? A Yes, often times she comes in and has told me—

Q Don't say what she said, just what you observed in her conduct. A Other children sometimes don't play with her, sometimes they make fun of her hand, ridicule her because her hand is disfigured.

* * *

28 A Q Have you observed her playing games? A Yes.

Q How does she use her right hand in playing games? A She seems to protect it as much as she can. In catching a ball she will use her other hand. The same way in playing games where they hold hands. As I said, sometimes other children don't want to hold her hand.

Q Now then in taking hold of anything, except for the little finger, she can grip it properly, can she not? A As far as I know. I don't know when she gets older that there will be as much force in her grip as she would have if that finger was not off.

Q Of course, you have, since this happened, on many occasions had to take hold of her right hand; the same as you would shake hands with a person, have you not?

A Yes, I have.

* * * *

31 A BY MR. WOOD:

Q Prior to November 15, 1945, with reference to this particular escalator in the Hecht Company store did you have knowledge of or know of any dangers in connection with the use of it by children. A No, I did not.

* * * *

32 A BY MR. WOOD:

Q Please state whether or not Betty-Lynne has had any medical attention or treatment since you left Washington. A She has not had any medical treatment; doctors have looked at her hand and advised us about it.

Q What was your purpose in procuring such advice? A To determine the feasibility of a plastic operation to improve the appearance of her hand.

Q What, if any examination was made by you and your husband? A There is a possibility that it can be improved through an operation. There is a complication that the keloid feature cannot be properly taken care of.

Q When was that—you just stated there was question whether the keloid tissue or scar could be cleared up. A Yes.

Q In the determination what was done about that that caused you to arrive at that conclusion?

33 A MR. CANFIELD: I don't understand that question.

(The reporter read the question as above recorded.)

THE COURT: What was done about that?

MR. WOOD: The question I put just before that, the witness had just stated in the determination that was made it was possible that the keloid tissue or scar could not or

would not be removed, they had no assurance that it would be.

THE COURT: I rather got the impression—maybe I was wrong—from her answer that there was some determination as to whether or not this tendency to produce keloid tissue would persist and keep it from being a successful operation.

MR. WOOD: Yes, your Honor.

MR. CANFIELD: If the Court please, is that not a question for medical testimony?

THE COURT: The doctor has testified on it. I think it is permissible for her to give her reasons why she didn't have it done.

BY MR. WOOD:

Q Is there any reason why you have not had a plastic repair operation up to this time, and if so, what? A They are not sufficiently sure to know whether an operation will help it, because of the keloid tissue, if
34 A that is controlled by another operation, fine and dandy, if it is not, the hand may not be improved by another operation.

Q What, if anything, have you done personally upon the advice of your physician that you have received to prepare the hand for such an operation? A I have massaged the hand with oils in order to loosen the skin so it will be pliable and loose enough so that the old scar can be cut out.

Q Has it become more pliable since you have been doing that? A Yes it has, considerably more.

Q Do you have in mind on the advice of a physician, to have such an operation performed? A Yes, we do.

Q And if and when advised by them, at the proper time? A That is right.

MR. WOOD: I think you may take the witness.

Cross Examination

BY MR. CANFIELD:

Q Mrs. Jacobsen, you folks had come here some twelve or fifteen years ago from Utah, had you not? A Yes.

Q Utah is your home? A It is my husband's home.

Q It is your husband's home, some 12 years ago you came here and took up residence in Arlington?

35 A A When we first came here we lived in the District.

Q Then you took up residence in Arlington? A Yes.

Q Was it '23, would you say approximately you came to Washington? A I came here in 1933.

Q From '33 up until the time of the accident you had been a customer of the Hecht store, had you not? A Yes.

Q You had a charge account? A Yes, I did.

Q And from time to time you and your children would go into the store to make purchases? A That is right.

Q How many times had you had Betty-Lynne, the little youngster in the store prior to the day of the accident? A I don't know.

Q Would you say a few or many? A A few.

Q But the older child you had in a great many times, had you not? A I would not say a great many times. I took the children down when I wanted anything, to purchase clothing for them. I didn't take them every time I went down.

Q How often would you say you were in the
36 A Hecht store prior to the day of the accident? A
When I went in or when the children went in.

THE COURT: With or without the children.

BY MR. CANFIELD: First take with the children?

A Not more than once a month, the children.

Q Is it not a fair statement that about once a month you had the children in the Hecht store? A Oh, possibly, I could not say definitely.

Q That is reasonably true, is it not? A Yes.

Q Now you had gone up and down escalators with the children many times prior to the day of the accident, had you not? A I had been in town, but I had not gone up and down escalators with the children.

Q Prior to the day of the injury? A Prior to the day of the injury.

Q You were quite familiar with escalators then, were you not? A Yes.

Q You were used, were you not on the occasions of your visits to the store prior to the day of the accident to the danger of getting loose and running wild and running around? A I had advised the children to hold

37 A on to the banisters as they went up and down the escalators.

Q You did that, of course, because you knew that this was a moving piece of machinery? A Yes, that is right.

Q And if they were not careful they might get hurt—you knew that? A Yes.

Q And you had that in mind when you instructed them? A Naturally.

Q Now the older child who was Geraldine—you called her Jerry— A Yes.

Q She would be about seven at the time of the accident? A Yes.

Q And the little girl was about two weeks less than four? A That is right.

Q You said you had instructed them prior to the day of the accident to hold on to the hand rail? A Yes.

Q You knew that was an element of protection for their safety, did you not? A Yes.

Q In other words, when you told them to hold on to the hand rail you yourself was cognizant of the
38 A fact that if they did not hold on to it they might fall or trip or have some accident on this moving escalator—you were aware of that, weren't you? A The hand rail is moving itself when it is in use, when you step on it it makes it easier for you to go up and down the escalator.

Q The rail moves with the stair case, doesn't it? A Yes.

Q In other words, it is moving, the hand rail which you hold on to like that moves in symmetry, they both move together? A That is right.

Q If you hold on to the hand rail it is an element of protection for safety? A I would say it is an element that makes it easier for you to use the stairs.

Q When you hold on to the rail you are moving with the moving steps? A If the rail were not moving you could not hold on to it.

Q So you knew, did you not, that was an added protection for safety? A I never did consider it as an added protection for safety.

Q All right. Now that morning of the accident, 39 A I think you stated you had gotten there around ten o'clock that morning—around ten o'clock in the morning and you first went to the second floor, did you not? A Yes.

Q Did you take the up escalator from the main floor? A Yes.

Q To the second floor. Did you warn the children then to be careful? A Mr. Canfield, whenever I took the children I would watch them carefully, I don't think I warned them every time I went into the store to be careful because I did not realize that danger existed.

Q Have you any recollection as to whether or not you warned them that morning? A No, I didn't.

Q All right. Now when you went up on the up escalator did you have hold of Betty's hand? A Yes.

Q How about the other little youngster, Jerry? A I don't know whether I had hold of her hand going up or not. Jerry was quite a little larger than Betty-Lynne and could hold on to the rail, and she may have, but I am assuming that.

• • • •

40 A Q On occasion, prior to the day of the accident had you permitted Jerry to go up and down the escalator by herself? A I never did that.

Q On the morning of the accident, that is November 15, you first went to the second floor? A That is right.

Q Now what did you have in mind purchasing on the second floor? A I had hoped to purchase a pair of leggings for Jerry and some underwear for Betty-Lynne.

Q And you found out from inquiry that the leggings were not on the second floor? A They didn't have any.

Q They didn't have any? A That is right.

Q Then you went up to the third floor? A I did.

Q Did you use the up escalator for that purpose? A I did.

Q Did you warn the children about holding on to the hand rails? A I again say that I don't know that I particularly warned them that morning, however, I watched them carefully as they went on.

Q As you went up to the third floor did you have
41 A hold of Betty's hand? A Yes I did.

Q Now, on the occasion of going up from the second—the second to the third, you had nothing in your hands, did you? A Just my pocketbook.

Q When you got up on to the third floor you did make some purchases, did you not? A Yes.

Q Do you remember, I think you said something about a Brownie dress? A A Brownie outfit.

Q Now was that wrapped up for you? A Yes, of course.

Q Was that pay or credit? A I don't remember.

Q Did you have a charge plate—I don't know what they call it? A A charge-a-plate.

Q A charge-a-plate? A Yes, I had one.

Q Do you recall whether or not you went to the Credit Department? A I don't recall going to the Credit Department that day.

42 A Q I see. Now after you made the purchases which you said you made that day I think you testi-

fied you went back to the second floor and looked for underwear? A I had in mind stopping on the second floor and looking for underwear as I went down to leave the store.

Q I see. Then you got on the escalator from the third to the second floor. Now did you say anything to either of the children about their being careful on the way down?

A I don't recall that I specifically said anything about that. I took every precaution to see that they were on the escalator safely.

Q Jerry went ahead, didn't she? A Yes.

Q How far down had Jerry gotten before you and little Betty-Lynne got on? A Jerry got on with me, Mr. Canfield. She hadn't gotten ahead of me at all until after we were on the escalator.

Q Well, she did go ahead of you then? A Yes, as soon as I was on the escalator then she proceeded to walk down the steps.

Q They were moving steps? A Naturally.

Q Did you warn her there was any danger in that. A I didn't know there was any danger on that. People were all the time using those escalators.

Q Didn't it occur to you that it was dangerous
43 A for a little child — A It certainly didn't.

Q Now, from the time Jerry started down there was nobody in front of you between you and Jerry, was there? A When you say nobody in front of me, Jerry walked in front of other people who were on the escalator when I was.

Q You mean Jerry squeezed in between the other people? A Yes.

Q Did you call out to her, warn her? A No.

Q Didn't that occur to you as being dangerous? A It certainly did not.

Q How many people had she gotten past in her process of going down, do you know? A Until when?

Q Until she reached the bottom? A I don't really know how many people were on the escalator. There were quite a few people, but I don't know how many.

Q Now, after you and little Betty-Lynne got on no other customers got in between you and Betty-Lynne and Jerry, did there? A I don't hardly know how to answer that question. When you say got in between us what do you mean?

44 A Q I mean starting on the escalator? A They could not start in front of me unless they were all children.

Q That answers my question. So that between Jerry who was starting down, and you and Betty-Lynne there were no customers on the escalator? A Not immediately when I got on the escalator.

Q Now did you have a package in your arm? A Yes.

Q What was that package? A A Brownie suit.

Q That was a paper bag, was it not? A Either that, or wrapped up, I don't know which.

Q It was not a bulky package? A No.

Q It was a very small package. A That is right.

Q You were able to carry it under your arm? A That is right.

Q Which hand did you have hold of Betty-Lynne with?

A I had hold of Betty-Lynne with my left hand.

Q Then she was on your right? A No, she was not.

Q She was not on your right? A She was on my left.

45 A Q You had hold of her with your left hand and her right hand, is that right? A I would be holding her right hand.

Q All right, you had been on that escalator many times before had you not? A Yes.

Q You were familiar with its operation, its speed, and the manner in which it operated? A That is right.

Q This escalator at this particular day was functioning normally, was it not? A Yes.

Q Smoothly? A Yes.

Q There was no jar or vibration, it was a right normal progress, was it not? A That is right.

Q Then suddenly Betty-Lynne wrenched her hand away, didn't she? A Yes.

Q And she started to go down the escalator? A That is right.

Q Did she walk or run. A She walked faster — she walked.

Q How far from the top were you when she broke
46 A away? A I think about one-third, I am not sure.

Q Do you remember how many steps are on the escalator, if it is standing still, have you any idea? A No, I could not tell you how many steps there are?

Q Let me show you plaintiff's Exhibit No. 3 which is a picture of the escalator in question — you may count them if you wish to — I have counted them here this morning — 22 steps from where it shows on the picture — 22 steps down — how many steps would you say you were down, would you say 22? A When Betty-Lynne broke away from me?

Q Yes. A About five.

Q So that Betty-Lynne would have had the distance of 17 steps to go down? A That is right.

Q How many people were on the escalator when she broke away from you? A The escalator was moderately full, I could not tell you how many people were on it, I didn't count them.

Q Could you estimate whether it was 3, 5 or 12? A I would say in the neighborhood of a dozen people.

Q In the neighborhood of a dozen people between where Betty-Lynne broke away and the bottom step,
47 A is that right? A There may have been more than that, I don't know how many people there were on the escalator.

Q At least 12, is that a fair answer? A I would say that was a fair answer.

Q All right, were those people standing still or moving with the mechanism? A Most of them; some of them may have been walking down. Often people walk down the escalator steps.

Q From what you say? A I have often seen people walking down the steps.

Q No, I mean at this time, did you see anybody moving or walking, or were they standing stationary holding on to the hand guard. A I was not watching the people on the escalator sufficiently well to answer that question.

Q How many steps between where Betty-Lynne broke away from you was the next person on the escalator? A May have been one, two or three steps — three steps ahead of me — I don't know.

Q Couldn't you have reached out and stopped her before she started that process of weaving in and out? A No, I could not.

Q Did you try? A Yes.

Q What prevented you from reaching her? A
48 A She just went on faster ahead of me; I went down as many steps as I could, following her.

Q Did you try to work your way through the persons in front of you to reach her? A Yes I did.

Q Were you able to do that? A I don't know whether I passed some people on the steps or not, I went down some steps, whether I passed people I don't know.

Q Did you call to the people around to stop her? A I did not. In the first place I didn't sense the danger until she fell down. I didn't want to call out because I didn't want to cause any panic, any commotion or any excitement in the place. I realize often panic itself breaks out all of a sudden.

Q Didn't it occur to you that a young girl, or a child going down there in the way you have indicated that a dangerous situation was present? A No, I was not aware of any danger on the escalator. I had no way of knowing. I had never heard of an accident on them. I had never seen any warning not to take children on escalators. I was not aware of the fact that there was danger other than the moving might be dangerous — I didn't know, I had no reason to be alarmed about it.

Q You were aware of the danger, weren't you,
49 A when you warned them to hold on to the hand
guards? A I think you do that because the steps
are a moving piece of machinery rather than doing it be-
cause of danger.

Q Did you consider it dangerous a moving piece of ma-
chinery, while the steps themselves are in motion? A No,
I never considered the steps that way.

Q In other words there was no danger apparent to you
at all? A No.

Q Now at no time did you call out to anybody to appre-
hend or stop Betty-Lynne from this process of weaving in
and out. A I already told you why I didn't.

Q I say at no time did you do that? A No.

Q Was she walking fast in this process of weaving in
and out? A Yes, I would say so.

Q She was trying to force her way through, trying to
squeeze through? A When you say force, you see a
three year old child would not require much force, it does
not take much forcing to get around between the legs of
people on the escalator steps.

50 A Q At any rate she got around the legs? A Yes.

Q All that time the escalator was moving
smoothly and normally, was it not? A Yes.

Q There was no jar — it just kept on going, the esca-
lator kept on going? A Yes.

Q Now, could you see over the heads of people in front
of you and watch the children and see the manner of the
descent? A Yes.

Q Had the other youngster, little Jerry, gotten off? A
Yes.

Q Could you tell where Jerry was at the time Betty-
Lynne reached the bottom of the steps? A Only that she
was off.

Q Was she off to the right or left? A I don't know.

Q Now you are familiar with escalators are you not,
that just as you come down you are carried forward you

are carried right across the comb plate, aren't you? A Yes.

Q In other words, you stand with your feet, your hands gripping the hand rail and you step off, you know that is the way the escalator functions? A Yes.

51 A How many steps up the escalator were you when you saw the child was caught. A About four or five.

Q How many people were in front of you, between you and the child when you saw Betty-Lynne was caught? A Three or four.

Q Did any of those three or four persons attempt to reach down and pick her up? A No.

Q They didn't do anything? A No.

Q They just laughed at the child when she was hooked? A That is right.

Q Tell me, how was the child turned when she got to the bottom, and if you want you may use the picture? A The moving steps that I don't know, she was thrown this way, she was thrown around and fell in a sitting position.

Q Let us assume this is a picture of the escalator. She was thrown out in that direction toward the floor? A That I don't know.

Q Can you recall any way as you remember it now, how the child turned so as to bring her right hand on the opposite side of the escalator from that which she was descending? A I don't know how it happened. All I know is that it did happen.

52 A Q As she passed those people on the staircase did she pass on the right hand side coming down or the left hand side coming down? A I think on the right hand side, Mr. Canfield, I am not sure about that.

Q Did she pass in and out both sides on the way down? A I think she stayed more or less to the left.

Q To the left, on the way down, to the right looking up? A Yes.

Q Do you recall whether she got on the right hand side at any time coming down? A I don't recall.

Q All you can say is that she slipped or she fell, you don't know what happened, is that correct? A No.

MR. WOOD: She didn't say she slipped at all. She has never used the word "slipped."

BY MR. CANFIELD:

Q You just don't know how she went off that step, do you? A I don't know how she fell.

Q But you say she did fall, you saw her catapulted, did you not? A Yes.

53 A Q In other words this is the right hand frame coming down and this is the left hand frame coming down. Her finger was not caught on this side; her little finger was caught on this side of the frame, was it not? A I don't follow your question.

Q Her finger was caught over there (indicating). A No.

Q On this side of the frame. A Yes.

MR. WOOD: I don't know what he means by "frame". That is not the frame. It is down by the floor where the step goes under to meet the floor.

BY MR. CANFIELD:

Q All right. When I use the word "frame" Mrs. Jacobsen, I mean the banister, I think you called it or the casing? A Did you say her hand got caught —

Q No, I didn't ask that question. I said this is the right hand side of the frame as you come down the escalator and this is the left hand side as you come down. Her little finger, according to your testimony is caught over on this left hand side as you come down? A Yes.

Q Now, can you tell us how she turned, what caused the change in her position so that she got caught on the
54 A left hand side of the frame rather than over on the right hand side? A All I can say is some way in falling she lost her balance in some way and she was suddenly turned around, I don't know how she did it. I don't

know what made her do it anymore than I suppose maybe in pivoting herself around some way — I don't know what made her get into that position.

Q You used the words "lost her balance". In what respect did you mean that? A Well, maybe I suppose she tripped in some way. I don't know. I don't know what made her lose her balance.

Q But she did lose her balance, is that right? A Naturally, or she would not have fallen. You don't fall unless you lose your balance.

Q You are familiar, so you said, with the movement of the escalator which has a tendency to force you out this way as it reaches the comb plate? A Yes.

Q Listen carefully, so we do not misunderstand each other — so you are sure, I mean she was forced out on the floor in this direction?

MR. WOOD: I object to that. She has answered that question once more. The witness answered she was not thrown out, that she didn't know how it was she fell and pivoted at the same time.

55 A THE COURT: I think the situation calls for a little something different from what he said. I don't know whether the witness knows it or not. She may say if she does. I think I will permit the question.

MR. CANFIELD: I will withdraw that if the Court please because I want to be fair about it.

THE WITNESS: I don't know what caused her to fall.

Q Have you any recollection when she was on the machine that carried her out how she was reversed in order to come back and get her hand on the opposite side, have you any idea how that happened?

MR. WOOD: I object to that.

THE COURT: Yes, I think you have implied something there Mr. Canfield that she has not said, namely, coming back and getting her hand caught.

MR. CANFIELD: I think you are absolutely right.

BY MR. CANFIELD:

Q Let me put it to you this way, I want to get your best recollection. Was the child carried out onto the comb plate? A I don't think so.

Q I mean, was she carried out on the stationary part of that brass plate? A I don't know, but I think Betty fell before she got to that point.

56 A Q Well, you say that the escalator was still running when she fell? A Yes sir.

Q Did it carry her out on to the stationary part? A I don't know, Mr. Canfield.

Q Now, when you looked down I think you said on direct examination you could see that the child had been caught? A Betty-Lynne was not caught immediately when she fell.

Q How long in seconds would you say it was from the time she fell until she was caught? A A split second.

Q Now, it is a fact, is it not, that her snow suit was caught? A Yes.

Q It was not the hand that was caught, it was the snow suit? A I do not know, I could not definitely say whether the snow suit was caught after the hand was caught but I do know that the hand was caught.

Q The hand was caught when you got her out? A The hand was caught when I got to her.

Q It was still, as you saw it trapped in the opening through the mesh where the stairs disappeared? A

57 A Do you mean the snow suit?

Q Yes. A I never did see the snow suit caught there, I just knew her snow suit was caught.

Q How did you find that out? A Looking at the snow suit, I guess.

Q After you got her home? A That is right, yes.

Q How much of it was gone? A A piece about the size of a silver dollar.

Q Was it a round piece or a long piece? A A U shaped piece.

Q Was that a wool play suit? A It was one of those knitted models that tied tight to the wrist, the snow suit itself was wool, the cuff itself it was one of those regular snow suit cuffs.

Q Was it the knitted part that got caught in the mesh?
A The knitted part was taken out.

Q That part of the suit then was caught. A That part of the snow suit.

Q I think you said that you were in the position of going down and trying to reach her, and you were thrown yourself? A Yes.

58 A Q Were you thrown over her body? A Yes.

Q Did you ever leave the floor? A Yes.

Q In other words, you were pitched? A That is right.

Q Did somebody push you? A If I was pushed it was people coming down the steps that just bumped into me because I was trying to reach the step and trying to release her hand.

Q When you saw her caught in the position indicated there was nobody around and the landing of the steps? A Yes, there were people on the landing.

Q How many would you say there were? A Several.

Q Were they in position to see the child in danger? A I don't think so.

Q Did any of them attempt to rescue her? A No, they didn't.

Q When you got there and you were pitched out did you scream for help when you were pitched out? A Yes.

Q How far were you pitched out on to the floor? A Two or three feet.

Q Then you got up and came back? A I came back.

59 A Q You could not get back? A Owing to the crowd around the escalator I could not get back to Betty-Lynne.

Q Was there anybody trying to pull her out then? A So far as I know there was nobody trying to do anything.

Q They just left the child scream? A They just left the child scream, nobody tried to do anything.

Q Did you try to get to her again? A Certainly.

Q Were you ever able to get back? A I was never able to get back to Betty-Lynne from the time I first saw her until she got to the First Aid room.

Q That was because of the people standing in front of you? A That is right.

Q Did you indicate she was your child? A Yes.

Q They would not let you through? A No.

Q Had the escalator stopped by the time you got to her?
A The escalator stopped when I got to her?

Q Yes. A I didn't get to Betty until I got up
60 A to the First Aid Room.

Q Did there come a time when you were pitched out on to the floor and tried to get back and could not and the escalator stopped? A Yes, the escalator stopped just as he got to her and picked her up.

Q I think you said you screamed at least three times. Where were you standing when you screamed? A I was out on the floor trying to get back to Betty-Lynne.

Q How far away from the brass comb plate of the escalator? A Several feet.

Q It didn't ever stop? A It slowly came to a stop.

Q You didn't see any employee come out? A No, I didn't see many people come out, I was in no condition to know whether they were employees or who they were. A lot of people were standing to see what was going on.

Q I think Mr. Wood asked you this morning if you did not know that there was a switch whereby the machinery could be stopped? A I did not, if I had I would have stopped it.

Q Did you stay right there? A Certainly.

61 A Q You know now that there was a cut-off switch, don't you? A I do know that the switch was in such a position that if anyone stands down here, much less eight or ten people, that the switch is entirely cut off from view.

With the people standing around it is impossible to see it opposite that escalator going up, and in order to see it one has to come down and has to look up underneath it if you don't know how to stop it.

Q Did you know where it was? A That is obvious, if I had known where the switch was —

Q You were more concerned with pulling Betty-Lynne out than you were with the switch? A I didn't know when I was bending over Betty-Lynne. I was more concerned with stopping it than anything else.

Q This is the snow suit the child wore, was it, a one piece snow suit? A No.

Q A two-piece? A Two-piece.

Q With a little belt around it? A A strap over the shoulder.

Q Now you did see a man take the child in his
62 A arms, did you not? A Yes.

Q And you later learned he was a store employee? A Yes, I assumed he was.

Q Did you know a woman named Mrs. Kratke? A No.

Q That she was an employee or a floor lady at least at that time? A Where?

Q At the place where the accident occurred? A I did not.

Q Now the escalator did stop? A Certainly, finally.

Q And Betty-Lynne was picked up and the man who had her started up the escalator stairs, did he not? A Yes.

Q They were not moving? A That is right.

Q And you were blocked? A Yes.

Q And where was Jerry all during this time? A She was down at the foot of the escalator in the crowd and followed us up to the First Aid room.

Q Did you call for her, ask her to go with you? A No.

63 A Q She just naturally followed you up. A Yes.

Q You went up to the infirmary, that is on what floor, the 4th floor, isn't it? A I believe it is on the 4th floor.

Q Now, you were taken to the nurse, a Mrs. Hawes, were you not? A I didn't know her name, she was the nurse there.

Q Were there not two nurses there at that time? A I believe so, but I am not sure about that.

Q After you got to the infirmary, the nurse gave the child first aid, did she not. A Yes.

Q Then you and two employes of the store and the baby went to the hospital? A And Jerry.

Q And where did you call your husband from, the store and you told him you were leaving for the hospital? A Yes.

Q And he met you there, did he not? A At the hospital.

Q When you got to the hospital they took her immediately to Dr. Coffey as you described here? A He took her as soon as the bandages were off — I didn't even call him. When he got to the hospital he took over from
64 A there. I never met the doctor until I got to the hospital.

Q I neglected to ask you one or two questions. Were you there when the pictures of the escalator were taken? A No.

Q At no time did you ever make any measurements of the width of the frame? A No.

Q Have you any idea how wide they are, or the frame is? A No, I have not.

Q It is rather narrow, is it not? A I think the escalators are narrow in comparison to some others I have been on.

Q Dr. Coffey continued to treat the child while he was still in the service? A That is right.

Q I believe you testified this morning that the child was in the hospital five or six days, I forget which? A I believe it was five days.

Q And then you took her home? A Yes.

Q And from that time on she was treated down at the

Navy dispensary? A Yes, for one or two treatments, Dr. Coffey then took her to his private office.

65 A Q Now, did he treat her in his private office while he was still in the service? A After his office hours at the Navy.

Q I see. Do you know when Dr. Coffey retired from the Navy? A No, I am not sure about that. I know it was after he took care of Betty-Lynne.

Q Approximately how many times did you take Betty-Lynne in there after the accident occurred, November 15, to let us say February, how many times did you take the child to see Dr. Coffey? A Oh, not more than two or three times from February on.

Q From February on he did not see the child more than two or three times, is that correct? A I think so.

Q You left town in August, 1946? A Yes.

Q So that from the first of February, 1946 until the first of August or about the time in August when you left town Dr. Coffey saw the child about two or three times? A I believe so, Mr. Canfield, I am not too certain about that.

Q Well, wasn't Dr. Coffey still in the Navy in 66 A February, 1946, when you were home? A I don't know when Dr. Coffey left the service, I think he left prior to that time, but I don't know.

Q Approximately how many times did he see Betty-Lynne? A I imagine that he dressed her hand about once a week.

Q For how many weeks? A For four or five weeks, and then after that he saw her maybe once a month or just occasionally. At the time we had the question up about the keloid he saw her a little more frequently, but I don't recall whether that was before or after February — it could have been after February.

Q I see. Now I think you took the child to Philadelphia did you not? A We did, yes.

Q And had the child examined by doctors up there? A Yes.

Q The child received no treatment, however, did she?

A No.

Q Then you went out to Utah. A Yes.

Q Has the child had any medical treatment in Utah? A No treatment. She has been examined by doctors there but no treatment as yet.

67 A Q Betty has not had any treatment at all? A It has not been necessary. The only treatment necessary is the operation which we are still undecided about.

Q Now, with reference to the youngster playing, you said she catches a ball, what kind of a ball? A Well, any kind of a ball that a child plays with, a rubber ball or any kind of a ball.

Q Well, you do not mean a hard ball of any kind you just mean a rubber ball. Does she play base ball? A No.

Q Soft ball? A I don't mean that. She plays the games that children play, throws the ball back and forth, she plays back and forth, that is what I mean in that respect.

Q She can do that? A Yes.

Q What other games does she play? A She plays games that any child plays, I don't know that I can name the specific games she plays — I don't know children's games.

Q What kind of instruction does she get in the kindergarten? A You mean in school?

Q Yes. A I don't exactly know what you mean.

68 A Q In her course of instruction? A Well, they teach them to read and write and how to make little things, pictures and colors, and that sort of thing.

Q Can Betty do that work? A Yes.

Q Do they teach crayoning? A Yes.

Q Does she do that? A Yes, she does.

Q She is able to carry on just as an ordinary four year old child does? A I think so.

Q When did you first start to teach her the piano? A Why did I start?

Q When did you start? A Oh, about a year ago Christmas.

Q You are a pianist yourself? A No, I am not a technical pianist.

Q I mean you do teach her to play the piano? A I know a few notes.

Q You can teach her. A I am not teaching her to play the piano, I show her how to play little pieces with one finger, pick them out, it is not fundamental teaching or
69 A anything of that sort, I mean it is just showing her how to play "Peter, Peter, Pumkin Eater" and some little ditties that children play on the piano, it is not teaching her music lessons.

Q She got through the first year in the Kindergarten all right? A Yes.

Q And has been promoted to the first grade? A That is right.

Q I notice here this morning in exhibiting her hand — you do remember exhibiting that to the jury? A Yes.

Q She is able to close her hand, is she not? A Yes, she is now. There was a question about that one finger. It seems to have come around all right.

Q It seems to have come around all right? A It seems to.

Q She has never had any infection since this accident in her finger? A Her hand was infected during the time she was being treated. There was infection set in due to the wound.

Q I mean, after the accident? A After the hand was cleared up?

Q Yes. A No.

70 A Q Can she button her clothes, her dresses? A Yes.

Q At the time she broke away from you did she give any indication she was going to do it? A Do you mean did she say, "mother, I am going to break away."

Q Yes. A Of course she didn't, because she just broke away like any child does.

Q She is a very impulsive child, is she not? A Not any more than any other child, she is impulsive like all children are.

Q Very agile, very quick. A Yes, she is a quick child.
MR. CANFIELD: I think that is all.

* * * *

Re-direct Examination

BY MR. WOOD:

Q You have had the hand looked at since being out in Utah? A Yes.

71 A Q By whom has it been looked at? A Dr. O. F. and Dr. L. F. Carroll.

Q Are either one of those gentlemen related to you?

A One is my father and the other is my brother.

Q What field is your father in medicine? A He is a surgeon.

Q How long has he been a surgeon? A He has been practicing medicine for over 30 years; he has been practicing surgery for the past ten years.

* * * *

BY MR. WOOD:

Q Then both those doctors advised you not to have the plastic operation, is that right? A Yes, we both felt it would be better to wait until the tissue of the hand was sufficiently loose and pliable so the old scar could be easily taken out.

Q Did you examine the portion of the escalator where you were riding before you went up the steps after the gentleman had taken Betty-Lynne out? A Heavens, no.

72 A Q Or at any time after that? A No, not until when he picked Betty-Lynne up I tried then to see what had happened to Betty-Lynne.

Q Now you said on cross-examination that Betty-Lynne

fell? May I have that one — before she got to that part I think it was when Mr. Canfield was asking you about the comb plate, right here, and you made the statement on cross-examination that she fell before she got to that part, did you not? A Yes.

Q She was at all times on the escalator, was she not?
A Yes, she was.

MR. WOOD: That is all.

(The testimony of Mrs. Jacobsen was concluded at this point).

196

Frederick W. Knox

* * * * *

Direct Examination

* * * * *

MR. WOOD:

Q Please state your full name. A Frederick W. Knox.

Q Where are you employed, Mr. Knox? A At the Hecht Company.

Q How long have you been employed at the Hecht Company? A Fourteen years this coming September.

Q Which would make it 1935 — 1934, September? A September, 1934, yes, sir.

Q These escalators, and those particularly from the second floor to the third, first to the second and second to the third were installed on June 21st — in June of that year just when you came to work for the Hecht Company, were they not? A I believe so.

Q What capacity were you serving in at the
197 Hecht Company in 1934? A As floor manager.

Q In what capacity were you serving in the Hecht Company in the years 1937, '38, '39, and '40? A Well, I was in the capacity of junior floor manager for approximately a year, and from that time on I had various assignments in connection with the entire store and then finally in connection with a campaign to reduce returns.

Q That is for '37, '38, '39 and '40? A I believe so —

I may have in 1938 or '39, I believe, gone into the customer relations.

Q 1939, customer relations? A Yes.

Q You have been in that ever since that, that is what you are in now? A At the present time I am customer relations manager, yes, sir.

Q Has that been the same position you had since 1939 on? A I believe so.

Q Now, this is a picture of the escalator, you have seen the escalator many times, have you not, Mr. Knox, and you are familiar with it? A Yes, sir.

Q That is the one coming from the third floor to 198 down to the second? A Yes, sir.

Q The down escalator. I assume you are also very familiar with the up escalator on the same floor, from the second to the third floor up, are you not? A Yes, sir.

Q You are likewise very familiar, are you not, with the one that goes from the second floor to the first floor down? A Yes.

Q Likewise the one up from the first floor to the second floor? A Yes, sir.

Q They are the type of escalator that is depicted in that picture, are they not? A Yes, sir.

Q I want to ask you if it is not true that what is shown in this photograph relates to the portion of the step — the top of the step — I will ask you this, this part of the step that has the corrugation, or what might be termed or called a tread, that is where it is bolted or screwed down on the top step, isn't it? A I believe so.

Q And that is an Otis escalator, is it? A Yes, sir.

199 Q Now this shows the bottom of the second floor down escalator, and I ask you if, with reference to the bottom of the second floor to the first floor escalator, if it is not identical in every respect, shape and form with reference to the treads, and the plates, and the spaces between them, are they not, from the standpoint of construction, the same measurements, aren't they? A You mean the bottom of the escalator on the first floor?

Q That is right. A Is the same as the bottom of the escalator coming from the third to the second?

Q That is right. A I believe so.

Q In other words, the comb plate used on the landing of the escalator from the third floor down to the second, the comb plate on that would be identically the same, would it not, as the comb plate of the down escalator — that is, the up escalator on the first floor? A Well, I have not actually compared them, but I would say that I believe them to be the same.

Q Well, they are the same model and make? A Yes.

Q The Otis Company put them both out? A Yes.

200 Q So that the space between the steps as they are moving and as they fold flat together to go under the comb plate on the second floor, which would be the third floor down escalator to the second floor, is the same as the space between the step and the comb plate as they go under the first floor, is it not? A I believe so.

Q With reference to the other construction, it is the exact duplicate of the one that is used on the down escalator from the third floor to the second floor and the one from the second to the first floor, they are identically the same, is that not so? A I believe so.

Q And there has not been since 1934, has there, Mr. Knox, any change whatsoever made in either of those two escalators, the down escalators, namely, from the third to the second floor and the second to the first floor, has there?

A I don't believe I get your point.

Q I mean as to model, it is the same type escalator, is that right? A The same yes, the same type.

Q You know they may have had to repair the plates, or something like that, but it is the same type and model? A I believe it is the same.

201 Q The measurement relating to the treads, they are identically the same, aren't they? A I believe so.

Q Now isn't it true also that the two escalators from the first floor to the second and the second to the third? A Yes, sir.

Q Now, have you at any time — I will withdraw that — On November 15th, 1945, at any time that day or even prior to, for that matter, the Hecht Company never did post any signs saying that children must accompany their mothers on the escalator, did they? A By signs on what date?

Q November 15, 1945. The Hecht Company did not post signs saying that children must accompany their mothers on the escalators, did they? A Not to my recollection.

Q There were no signs near these third floor down escalator and second floor warning people that they were dangerous, was there?

Mr. Canfield: If the Court please, I object to that, because that is presupposing for the record that they are dangerous. I object to the form of the question.

The Court: The question is whether there was a
202 notice or any sign, I will permit that, what is the answer?

The Witness: Not to my recollection, Mr. Wood.

* * * * *

Q There was no sign near the escalator for that matter on any of the rest of them in this building telling people who used them how to use them, to put their hand on the hand rail, was there? A I am not too certain, I don't recall, Mr. Wood.

Q You would be likely to know it if you were the head of the Customers Relations Unit, would you not? A Not necessarily.

Q They would not be there unless you knew about it, would they? A Yes.

Q How could they? A Well, I don't know of any sign.

Q Your answer is there were not any according to your knowledge, is that so? A I don't recall, Mr. Wood.

Q Well, I would like to have a definite answer whether there were or there was not.

The Court: If the man says he cannot recall how can you ask him to say something he has no recollection about?

Mr. Wood: He can state his knowledge on it.

The Court: That is right. I understood him to
203 say that he has no recollection that there was.

Mr. Wood: Of course, I am calling this witness under 43-B.

The Court: I understand that. I have not limited your right to cross-examine him but, after all, you can't expect a witness to say something he has no recollection about.

Mr. Canfield: Oh, I have not objected to it.

Mr. Wood: You could not, you don't have any—

The Court: Gentlemen, gentlemen.

By Mr. Wood:

Q Mr. Knox, could you tell us whether you started in the Customer Relations Unit or Department whichever you may call it definitely in '39 or not, you said you were not quite sure? A I don't recall the exact date, Mr. Wood. It seems to me that I had various assignments for a period of approximately four, five or six years; I just don't recall.

Mr. Wood: Will Your Honor indulge me just a moment?

The Court: Yes.

Mr. Wood: Thank you.

By Mr. Wood:

Q Now it is true, isn't it, Mr. Knox, that in November — or on November 15th, 1945, the Hecht Company invited children to use these escalators? A Yes, sir.

204 Q That invitation extended, of course, to the infant plaintiff in this case, Betty-Lynne Jacobsen, did it not? A Yes, sir.

Q She had a perfect right to use that escalator on that date, did she? A Yes, sir.

Q You had no signs warning that she could not use it alone if she wanted to, did you? A Not to my recollection.

Q These escalators, of course, are under the Hecht Company's exclusive control, are they not? A I believe so.

Q There is a mechanism underneath the steps of each one that the machinery operates on, is there not? A Yes, sir.

Q And there is a key that turns them on and off at the base or top of each, is there not? A Yes, sir.

Q And those keys are in the hands of the Hecht Company agents and employees and officers, are they not? A Yes, sir.

Q And on November 15th, 1945, the escalator from the third floor to the second floor, namely the down escalator was at all times on that date in the exclusive control
205 of the Hecht Company, the defendant in this case, was it not? A Yes, sir.

Mr. Wood: Now, if the Court please, that brings me to the following testimony with reference to the other photographs, and perhaps we should approach the bench.

The Court: Well, I think we will defer examination on that until I have made a ruling on that matter that I withheld.

Mr. Wood: Very well.

The Court: If you wish to examine this witness with that reservation, you may recall him.

Mr. Wood: Yes, I understand that I may have the privilege of recalling him when you made your ruling one way or the other.

The Court: At this time we will take a brief recess.

* * * *

217 The Court: Here I must proceed on the theory that the appellate courts of this jurisdiction have decided that the highest degree of care is required.

Mr. Canfield: Now, then, Your Honor asked us specifically to look into the carriers to see if the point has not been raised.

The Court: It seems to me it must have been.

225 Mr. Wood: May it please the Court, if it were
not for the fact that the defendant itself has in its
own answer made this allegation, then there may be some
question of doubt with reference to bringing in some evi-
dence to show, for instance, that Woodward and Lothrop or
the Palais Royal had used a more modern escalator than
226 had Hechts, and certainly, that the more modern es-
calator that was used by Woodward and Lothrop
and other stores was safer. We do not have that in
this case, therefore, it seems to me the problem is not
nearly as difficult as it would appear from Mr. Canfield's
argument. They have alleged in their answer:

"Defendant denies that it was guilty of any negligence
in the premises and states that the escalator maintained
was in a safe and proper condition, and that it was oper-
ated normally and as designed, and that it is of the usual
and approved type of such escalators generally in similar
stores in the District of Columbia."

Here we are introducing photographs to show clearly
that this defendant on this date, and on the date in ques-
tion when this accident occurred, used two different types
and that aside from the highest degree of care, which I
will come to in a minute, the mere fact that he has used
two — the mere fact that they have used two, and they have
alleged that the one that caused this accident is a safe one
when, as a matter of fact, by viewing the pictures them-
selves, you can see that a better type, a safer type, puts
them in position, I think that the answer thereto logically
would be to allow the jury and the Court to see what is in
their own store.

Now I say that that is fundamental, and it is in their answer, and for that reason alone yesterday — I
 227 mean Friday, I felt that it was admissible on that score alone, regardless of whether you go into the degree of care or not, that is what Mr. Canfield has argued, so let us come to that, but I don't want to forget that main question, but on that alone it would be admissible, because they have stated that in their own answer, and therefore as tending to show, at least in refuting what they have said in their answer that another type that they are using, not someone else, not Woodward and Lothrop, is safer, I say on that score it makes it admissible.

* * * *

230 The Court: Mr. Wood, that question is not the question I am trying to decide now. I am trying to decide the narrow question whether or not under the highest degree of care, which I have already said I think is the rule here, that the owner and operator of the escalator
 231 is required to install a more modern and safer means than that which was all right when he did install it. That is the narrow question.

Mr. Wood: I was merely answering some of his statements made in his argument. I take it that he practically gave up on any principle of law, but he said he was talking analogy —

The Court: His analogy is that under the cases that he cited he did not think that the highest degree of care was applicable and I say that to lay a foundation for reexamination by our Court of Appeals of the statement that it was particularly in view of Judge Arnold's reference to a reasonable degree of care in elevator cases, but that is not the point I am struggling with here. It is that narrow point that I tried to tell both of you gentlemen I am anxious to have your thought on, whether or not the highest degree of care requires the installer and operator of an escalator to use a safer means than that which it already has when and as it becomes known and in general use.

Mr. Wood: I am merely answering his analogy, and if Your Honor —

The Court: Suppose you answer that one. That is the thing I have got to base my ruling on, and so we might as well get to it.

• • • • •

232 The Court: There may be contributory negligence on the part of the mother here. If so there will be ample time for the jury to pass on that. I am not going to do that as a matter of law. I have already said so. If there was contributory negligence on her part it would only go to the right of the father to recover. It would not go to the right of the child.

• • • • •

241 The Court: Well, gentlemen, I am ready to rule. In the first place, as I have said time and time again, I feel the rule has been established in this jurisdiction to the extent that it is binding on the Trial Court that the same degree of care is required of the operator of an elevator as is required of a common carrier, namely, the highest degree of care, although for certain purposes they are distinguishable from a common carrier. I have ruled, and I think properly, that the same degree of care is required of the operator of an escalator as that which is required of an elevator. In view of the authorities that have been cited to me, I cannot help but hold that the same degree of care that is required with respect to its operation is the degree of care required in its construction, namely, that while it is not an insurer, every skill and foresight reasonably required to protect the safety of the passengers should be exercised.

I cannot say that in every instance that requires the substitution of a known means of improvement that has
 242 through general use, neither can I say it is an exercise of the required degree of care not to make that change. That I think is the question in the light of the facts

and circumstances to be decided by the jury, as to whether or not that degree of care was exercised, and I think it is incumbent in making that issue to show that other and safer means were in general use, particularly in use by this same defendant.

I do not say that it is negligence on his part not to have made the substitution. I think it is a question for the jury.

I do not agree with counsel for the defendant that that can be the duty of the defendant only if it eliminates the possibility of danger. Again I say I think the rule is not whether or not a newer and safer means is an exercise of all the skill and foresight required to minimize the dangers to protect the passenger from injury, it may not do it. If that degree of skill is used and foresight, why, the defendant is not liable, even if the passenger is injured. That is my view of the situation, and I will overrule the objection to the admission of the photographs and the other means suggested.

* * *

243 Q You have previously been sworn, Mr. Knox. I think I asked you the question on Friday as to the date of the installation of the escalator here in question, the one from the third to the second floor, the down escalator, and all those used from the first to the second and the second to the third were installed in June, 1934, is that right? A I believe so.

Q Did you subsequent to that date install a different type of escalator, Mr. Knox? A Yes, sir.

Q You installed those in September or October — approximately September, 1941, did you not? A I believe so.

244 Q I now hand you two photographs, one just having been marked Plaintiffs' Exhibit 6, and ask you if that does not depict a close-up of the bottom of the up escalator from the third to the fourth floor? A Well, I really don't know whether that depicts the one from the

third to the fourth floor. It looks like the equipment laid out in the later installation.

Q Yes. Well, I will let you see Plaintiffs' 4, that is the old installation in 1934, is it not? A Yes, sir.

Q And this is the new one in 1941? A Yes, sir.

Mr. Wood: I would like to offer these in evidence, they are marked with these two numbers, if Your Honor please, 6 and 7.

The Court: All right, they are admitted.

[Photographs previously marked Plaintiffs' Exhibits Nos. 6 and 7 were received in evidence.]

Mr. Canfield: I understand, if Your Honor please, that it is over my general objection.

* * * *

By Mr. Wood:

Q It is true, is it not, Mr. Knox, comparing these two photographs, Plaintiffs' Exhibit 4 and Plaintiffs' 245 Exhibits 6 and 7, that the cleats or treads on the steps, attached to the steps, are much closer together, is that not so?

Mr. Canfield: If the Court please, I think there will be measurements here which will answer that question more definitely. He is calling for a conclusion as to whether or not they are closer together. First the pictures will speak for themselves, and I understand he has subpoenaed measurements which will clearly develop that fact.

The Court: I think what you say is correct. However, if this witness knows whether or not they are closer, I believe he could be asked to so testify. If he does not, why, he cannot.

Mr. Canfield: Very well.

By Mr. Wood:

Q Is that so? A I believe they are closer, yes.

Q And that being so, the space between the comb plate on the newer type and the cleat or tread of the step, the space itself on top, as it meets the comb plate is likewise

less than the space between the older type, is that not so?

A Yes, sir.

* * * *

246

Cross-Examination

By Mr. Canfield:

Q Mr. Knox, when this escalator from the second to the third floor was installed in 1934 they were all from the Otis Elevator Company, were they not? A Yes, sir.

Q And did the elevator company install them themselves? A Yes, sir.

Q When the escalators were bought in 1940 and '41 they were much improved; they were likewise all from the Otis Elevator Company were they not? A Yes, sir.

Q And this elevator company installed them themselves? A Yes, sir.

Q In other words whatever was done so far as the construction and installation was done by the Otis Elevator people? A Yes, sir.

Q And not by the Hecht Company? A Yes, sir.

Q Now where are the escalators with reference to the elevators; are the escalators anywhere near the elevators? A Yes, they are about, I would approximate the distance as being about twenty feet or twenty-five feet.

Q Are there staircases also between the floors? A Yes, sir.

Q For the use of customers? A Yes, sir.

Q Are they so marked? A Yes, sir.

Mr. Canfield: I think that is all I have at this time. If there will be any more questions, if the Court please, I will have to make him my witness on the defense.

The Court: All right.

Redirect Examination

By Mr. Wood:

Q Mr. Knox, do you have any signs in the store at all telling people to use the elevators or staircases in preference to the escalators? A No, sir.

Q You have maintained both types, those in-
248 stalled in 1934 and those installed in 1941 continu-
ously ever since both have been installed and they
are those in the store, are they not? A Yes, sir.

Mr. Canfield: I neglected to ask this question — are the
escalators to your knowledge inspected from time to time?

The Witness: Yes, sir.

Mr. Canfield: By whom?

The Witness: By our engineer, and I believe they are
inspected daily, and I believe by the District authorities —

Mr. Canfield: The District of Columbia?

The Witness: The District of Columbia authorities, I
believe once a month or once every other month, I am not
too certain.

Mr. Canfield: By the District?

The Witness: By the District, yes.

Mr. Canfield: Are they inspected from time to time by
the Otis people, if you know?

The Witness: I believe so, however, I am not too cer-
tain.

Mr. Canfield: That is all.

Mr. Wood: That inspection has to do with the operation
and movement solely, does it not?

The Witness: Why, I believe it has to do with all
249 phases of its operation, yes.

* * * *

Chester M. Bray

* * * *

Direct Examination

By Mr. Wood:

Q Would you please state your full name? A Ches-
ter M. Bray.

Q You are chief engineer of the Hecht Company, are
you not? A Yes, sir.

Q How long have you been the Hecht Company's chief engineer? A About eighteen years.

Q You were there and working as an engineer in 1934, were you not? A Yes, sir.

Q You have knowledge of the installation of the escalators on the first to the second and the second to the
250 third floors, do you not? A I was there when they were installed, yes, sir.

Q I will hand you these photographs marked Plaintiffs' Exhibits 3, 4, and 5, and ask you to examine them if you will, please, sir.

Are they not photographs of the escalator that was installed in the Hecht Company's store on or about June, 1934? A These two, yes.

Q Isn't this one also? A That is the — yes, that is correct, yes, sir.

Q And isn't that escalator from the third floor to the second floor the down escalator? A. I would say yes, it is.

Q Now, then, you installed a newer type, did you not, in the Hecht Company store in 1941, September, did you not? A Yes, sir.

Q You were then the chief engineer? A Yes, sir.

Q I hand you these photographs marked Plaintiffs' Exhibits 6 and 7, and ask you if you will note the picture, the close-up of the bottom, the one of the newer type installed by the Otis Company in September 1941. A Yes, I remember it, the new type, this last one installed.

Q You were on duty on November 15th, 1945,
251 were you not? A Yes, sir.

Q Among your duties as chief engineer one of them is to supervise the operation of the escalators in the Hecht Company store, is it not? A Yes, sir.

Q Do you have any assistants under you? A Yes, sir.

Q How many? A About fifteen at the main store.

Q You were on the second and third floors of the Hecht Company on November 15th, 1945, in the morning, were you not? A Yes, sir.

Q The Hecht Company did not have any guard stationed at the bottom or the top of the down escalator from the third to the second floor on that morning, did it? A No, sir.

Mr. Canfield: I object to that on the ground it is irrelevant, immaterial and incompetent; it does not tend to prove negligence.

The Court: There has been a good deal stated in the case about the use of the escalators. I do not think that the particular act of negligence charged here, that they did not have any guards — I will let the evidence in at 252 the present time, but without prejudice to what ruling I shall make.

By Mr. Wood:

Q In November 1945, on the 15th day of that month, the Hecht Company had no signs in its store prohibiting children or any age to use the escalator, did they? A I don't remember any.

Q Did you have signs posted anywhere prohibiting children using the escalators in your stores? A I would say no; I didn't see any, I have no definite knowledge of that.

Q Isn't it true that since 1934 when the first ones were installed right up to the present date, and since the second ones were installed in 1941, no signs have ever been posted? A I don't remember seeing any.

Q In other words, no signs were posted on November 15th, 1945, telling children not to ride on the escalators unaccompanied by their mothers, is that so, Mr. Bray? A I have no knowledge of any such sign, sir.

Q About what is the speed per minute that the escalator is designed to operate normally? A About ninety feet per minute, sir.

Q I ask you to again refer to Plaintiffs' Exhibits, 3, 4, and 5, and I ask you this question, whether or not 253 the escalator that is depicted there is the escalator from the third to the second floor, the down escalator? A Yes.

Q And I ask you whether or not the down escalator from the second to the first floor is not identical in construction and operation to the one that you see right there? A I would say yes.

Q Both are identically the same type and they operate the same, do they not? A That is right, yes, sir.

Q And even the up escalators on the same two floors, the first to the second and the second to the third are also of that type and mechanically identical with that one? A From the first to the third up and the third down, I guess that is your question, are identically alike, is that what you mean?

Q In movement and operation? A That is right.

Q There is no difference between them at all? A No.

Q And the moving steps on the one at the bottom of the down escalator from the second to the first floor come into the stationary comb plate at the floor the same way in the same manner as the steps do on the down
254 escalator from the third to the second floor, is that right? A That is right.

Q The space between the corrugations or treads on the steps in the newer type installed in 1941 is less than the space between those on the older type installed in 1934, is it not? A Yes, sir.

Q And the space between the steps of the 1934 escalator as it meets the comb plate in the floor and goes to disappear under the floor is wider than the space at the top of the steps—or at the top of the tread than it is in the newer 1941 type, is that right? A You mean at the top of the corrugation?

Q That is right. A Yes, sir, it is wider on the old one than on the later ones.

• • • •

Q You, as the Hecht Company's chief engineer, have the keys to all escalators in the building, do you not? A Yes, sir.

Q Is the machinery underneath the steps or is it— A
The machinery is underneath the floor.

255 Q The machinery is underneath the floor? A
That is correct, on the side of the steps.

Q You, as chief engineer for the Hecht Company have exclusive control and management and supervision over the maintenance and operation of those escalators? A
They come under my supervision, yes.

Q On all floors? A On all floors.

Q And you did have that on November 15th, 1945? A
I did, yes.

* * * *

Cross-Examination

By Mr. Canfield:

Q Mr. Bray, as chief engineer you have, I suppose, men under you, and it is part of your job, is it not, to examine all of the appliances and machinery in use in the building? A Yes, sir.

256 Q And that was your job on November 15, 1945? A Yes, sir.

Q I think you testified you were present when the first escalators were installed back in 1934? A That is correct.

Q Who installed those escalators? A The Otis Elevator Company.

Q The Otis Elevator Company? A Yes, sir.

Q Did you have anything to do with the construction or installation? A No, sir.

Q Were they installed subject to plans and specifications? A That is correct.

Q And prior to the time that they were installed will you state whether or not they were inspected by the authorities of the District of Columbia. A Ask that again, please.

Mr. Canfield: I will ask the reporter to repeat the question.

[The reporter read the last question as set forth above.]

The Witness: Do you mean while they were being installed?

By Mr. Canfield:

257 Q Before they were put in operation? A That is right, they were accepted and passed by the District and we were given a certificate.

Q Were you there when the District of Columbia Inspection Department made the inspection? A Yes, sir.

Q You accompanied them, did you not? A Yes, sir.

Q What was the purpose of the inspection? A To see that they were operating satisfactorily and safe, so far as I know, I should say.

Mr. Wood: If the Court please, I object to that and move that it be stricken. The best evidence of that is the District of Columbia authorities.

The Court: Well, he can tell about the inspection. I think he was present.

* * * *

258 By Mr. Canfield:

Q What was the purpose and the reason for the inspection? A To see if they were installed properly and to see if they were operating properly, the safety devices operating, and I should say that it covered your question. If it does not, ask anything and I will try to answer any question.

Q Isn't it a fact before you could turn them on or before any operation could take place under the law of the District of Columbia, they had to be inspected by the District of Columbia? A Before a passenger could ride on them, yes, sir.

* * * *

Q Now these work by electricity, of course? A Yes, sir, driven by an electric motor.

Q You said that the machinery for each particular escalator is adjacent to or under the floor of the particular frame. A That is correct.

Q Now can you describe briefly for the benefit of the jury just how that machinery works—take the down
 259 escalator particularly, because that is what we are interested in. A Do you mean what causes it to run?

Q Yes, how it functions, what stops it, and so forth, just take the whole thing and describe it. A Well, the steps go up as any pair of steps in your house, and each one of them—under the steps there are rollers, these rollers run on iron tracks, and there is a chain that goes from the—goes over the top of the gears, which is driven by a motor there to a reduction gear, and that controls the steps up or down, whichever way they might be going. Does that answer your question?

Q All right. As the steps reach the level of the floor on the down escalator, what becomes of the steps? A Why they just go over a pulley and back again, a belt around two pulleys.

Q Do these steps break in order to disappear? A After they go under the comb plate they separate.

Q All right. Now take the steps at the bottom just as it goes into the comb plate, what changes them with reference to levelling off? A They flatten out as it goes under the comb plate.

Q Does that leave an opening between the two steps as they break and disappear under the floor? A You mean the space between the steps?

260 Q Yes. A There is a space between the steps as they flatten out and go under the comb plate.

Q That space exists between the steps and the corrugation itself? A Yes.

Q That is a separation? A Yes.

Q That is in the '34 model? A Yes, sir.

Q Is there a similar break in the later model, the '41 model? A I believe so, yes, sir.

Q Do they function the same way? A Function the same way.

Q Is there any difference in the way the steps break when they disappear under the comb plate? A No.

Q There has to be an opening, does there not? A There has to be an opening, the steps go over like this, they turn, the front portion, they go under, that break takes place after it passes under the comb plate and starts to turn over.

Q In other words the steps do not separate until
261 they pass under the comb plate, is that right? A That is correct.

Q And break the pattern as they level off, do they not? A May I show you what I mean?

Q Yes. A As the steps go under the comb plate they level off like this—after they go under the comb plate and then they start to turn—do you understand what I mean?

Q There is a separation as they move into the comb plate, there is a separation like that, is there not, as they go into the comb plate? A Yes, there is a separation between the steps, but naturally the difference between the steps themselves the difference between the corrugations on the top of the steps—here is the distance between those—that is the question you asked me—the difference between the corrugations?

Mr. Wood: I am not asking any questions right now, you answer your own lawyer's questions.

By Mr. Canfield:

Q What I am trying to develop, there is also a break in the step? A Yes.

Q As the steps go under the comb plate they do
262 that, do they not? A Yes.

Q And after they pass under the plate? A That is correct.

Q That break does not appear until after they have disappeared? A That is right.

Q Do the '41 steps function the same way? A The same way.

Q Do you know of any other way as an engineer that those steps could disappear without that separation? A No.

Q And that goes for the '41 as well as the '34? A Yes, sir.

Q Now, in 1934, can you state whether or not this was a standard accepted model escalator in use in this section of the District of Columbia? A It was, yes, sir.

Q And it was the Otis standard type, was it not? A Yes, sir.

Q You said that the speed the escalator moved at a distance of ninety feet per minute? A Yes, sir.

Q You are quite familiar with escalators? A Yes, I know something about them, yes, sir.

Q Do you know whether or not it is a standard
263 speed, ninety feet? A I understand that the standard speed is around that here.

Q They are controlled by a governor? A Yes, sir.

Q Both types controlled by a governor? A Yes, sir.

Q In other words, a governor regulates the speed of the escalator? A Well, again that motor is designed to develop a certain speed, then it goes through a reduction gear the same as in an automobile, and that is a constant speed on the governor. It is there in case for any reason the escalator would either speed up or would go more than ninety, the brakes would go on and immediately there would be a stop.

Q Now there is a cut-off switch and there was in 1945, at the foot of each of those escalators, is there not? A Yes, sir.

Q How do you stop them? A Just push a button.

Q Does it require a key? A To stop them, no.

Q What kind of a button do you say, something
264 like an electric light switch? A Yes, only a larger one, the size of a nickel five-cent piece, even half an inch on top.

Q Is it a button you push in? A Push in with your finger.

Q After the button had cut the current off, can it be started again by pushing the button? A No, sir.

Q Do you have to start it? A Take a key and put in like you turn it sometimes to unlock a night latch in a door.

Q I think you told Mr. Wood you were the only one with keys. A No, I didn't say I was the only one. He asked me if I had the keys for the escalators and I told him I did, but other people have them.

Q If the escalators are cut off for any reason is it a fact that you must inspect them before they are started, you or somebody under you? A Some man or myself, yes.

Q That is, a member of the engineer department? A That is correct.

Q As to cutting them off, who has got the authority to cut them off? A Anyone in authority, the floor
265 managers, engineers, any sales person that happens to be around when anything is wrong with it, why, sometimes people drop a handkerchief or a watch or jewelry or things like that, whoever is there, they just push the button and stop it for them.

Q The average employee on the floor has the authority to stop it? A Anyone can stop it.

Q Whether they are an employee or not? A That is correct.

Q These escalators also have moving hand rails, do they not? A Yes.

Q In other words, as the steps come down or go up, the escalators move, the hand rails move? A That is right.

Q In coordination with the speed? A Yes, sir.

Q So that if a person stands on one of the steps of the escalator, if a passenger up or down were to take hold of the hand rail, the whole thing moves coordinately? A That is correct.

Q Did you examine the escalator steps of this down escalator on November 15th, 1945, after this accident? A

Yes, sir.

266 Q For what purpose? A To see that everything was working satisfactorily and no step or comb plate was broken, or anything of that type.

* * *

Q Did you find any evidence of anything wrong with the escalator or the steps? A No, sir.

Q Were there any comb plates broken off? A No, sir.

Q Were these steps normal? A Yes, sir.

Q Did you find any foreign substance or anything which would cause people to trip on the floor? A No, sir.

Q Was the hand rail functioning at that time? A So far as I know, yes, sir.

Mr. Wood: If the Court please, I think that is all, according to our Rule 43, it says that he cannot go beyond that, if he does, it seems to me he is making him his own witness.

267 The Court: Well, I think your direct examination covered pretty largely the operation of these escalators.

Mr. Wood: I did not go into anything with reference to the accident on the day in question or as to how it happened, insofar as he was concerned.

The Court: I think you are probably right about that.

Mr. Canfield: He is right, I agree on that.

The Court: Confine your examination—

Mr. Canfield: All right, Your Honor.

Mr. Wood: Except his attendance on that morning, that is the only thing I questioned him about.

The Court: Yes, I think you did.

By Mr. Canfield:

Q Now you say the elevators or escalators were inspected by the District of Columbia before they were permitted to be put in use? A Yes, sir.

Q Are they inspected from time to time by the District authorities? A Every four months, sir.

Q Every four months? A Yes.

Q By reason of what? A The law.

268 Q The law? A Yes, sir.

* * * *

By Mr. Canfield:

Q You say these were inspected by the officials of the department of the District of Columbia? A From the District of Columbia.

269 Q What department? A That comes under the Building Inspector, elevator inspector's work under the Building Inspector.

Q You say that is required under the law? A Yes, sir.

* * * *

By Mr. Canfield:

Q If you are there and the inspections are made in your presence what does the inspection consist of? A They inspect the steps to see if they are loose, look at the step treads, the comb plate, the hand rail, the motor controller board, the worm gear, the chains under underneath,
270 and everything they can see.

Q Do they make a record of those inspections? A Yes, sir.

Q You say—how often is that done? A That is required by the law once every four months.

* * * *

271

Redirect Examination

By Mr. Wood:

Q The inspection you have been talking about, Mr. Bray, would not have a thing to do with the space between the step and the comb plate on the old type or the new type, would it? A No.

Q It would not decrease or enlarge that space at all, would it? A Not a bit, no.

Q So that it has not a thing to do with the space on the old type or the new type between these steps, does it?

A They don't inspect the space, and it does not have a thing to do with it.

Q It does not have a thing to do with it? A No.

Q Now you spoke on cross-examination, or counsel, as a matter of fact said to you the steps levelled off as they folded when they come into the position to go under the steps.

As a matter of fact in Plaintiffs' Exhibit No. 4 and Plaintiffs' Exhibit No. 5, those steps are shown level, are they not? Take for instance No. 4, just before they level

off they are about ready to go under the comb plate, 272 is that not so? A I think the question I answered for him, the steps are level when they go under the comb plate, yes.

Q Take, for instance, Plaintiffs' Exhibit No. 3, if you will step down for a moment and let the jury see this—will you step down here, come around in front of me right this way, then you can hold it in your hand, just hold it up this way so they can see it—these two steps right there, they are levelled off, are they not? A I would say yes.

Q Will you come up this way and point out to them the two steps in photograph No. 3 that have levelled off?

A I would say these two down at the bottom here are about practically level as they go under this comb plate. When they get to this place here the steps here should be perfectly levelled off.

Q Now then this crack or opening right there shown in Plaintiffs' 3 is the space between the two steps, correct? A This space you are showing me here is the space between the top corrugation, the space between the steps—

Q I mean the space between the top corrugation or

tread on the step, do I understand that is the step? A That is the place on the top step.

Q That is a portion of the step? A A portion of the step.

273 Q That space right between there as they move into the comb plate is stationary, right? A That is right.

Q These inspections that the District of Columbia Inspectors make or that you make every morning haven't a thing to do with that space, have they? A No.

Q That remains the same from year to year? A That space is constant.

Q Come down here in front of the box and show that to the jury, will you please, point out to them this step that you say flattens out just before going in under the comb plate. A [The witness points out to the jury the steps in question.]

Q Point out, will you please, the place where the two steps flatten out about ready to go in under the floor? A These steps [indicating] are flattened out.

Mr. Wood: Thank you, you may resume your seat.

By Mr. Wood:

Q What I have said with reference to the inspections that the District Inspector makes and you make concerning this space between the two steps which disappear under the comb plate applies equally to the new type
274 that you installed in '41? A That is correct.

Q Now isn't it true that when the escalator, when that step that you are on begins to level off, just as it starts to fold under the one you are standing on, is there a sort of little jar to it?

Mr. Canfield: I object, if the Court please. The evidence in this case is that the escalators were functioning normally and smoothly and there were no jars.

* * * *

275 The Court: Yes, I did. Well, I think I will let him state what the normal operation is. Answer the question.

The Witness: The normal operation is smooth.

By Mr. Wood:

Q Then, when these steps begin to level off as you stand on them there is no vibration either forward, sideways or backwards in any way, shape or form? A Not to my knowledge.

Q Now is there any vibration as they level off when you are in front of them, as they level off? A I don't know of any vibration as they level off, just as smooth as this when you are coming down as when you
276 are going up.

* * *

By Mr. Wood:

Q When you said you are going ninety feet, you meant that from your own knowledge, being on them yourself? A I have never seen any that went over ninety.

Q You have stated that the keys are held by those in authority, but by that you meant the floor manager? A Floor manager or buyer, they are kept
277 in an exposed place where they can get them.

Q And sales clerks behind the counter don't have keys, do they? A No, sir.

Q Sales clerks behind the counter in the store are not instructed how to turn off the escalators, are they? A Not all of them, no.

Q You were there as chief engineer in the fall of 1938, weren't you? A Yes.

Q And were you there in the fall of '37, '39 and '40? A Yes, sir.

Q Didn't you see an accident that took place on the main floor—

Mr. Canfield: If the Court please, I now move to withdraw a juror and declare a mistrial.

The Court: I certainly won't do it because the question is asked. I may have to do it if the question is answered—I think you better come to the bench.

I will let the jury go out, we are going to take a recess anyway shortly.

[Whereupon the jury retired from the courtroom.]

Mr. Wood: If the Court please, the Court of
278 Appeals has ruled in a number of cases, and more recently in the case of Meyers versus Capital Transit Company, 75 U. S. Appeals, D. C., 257, 126 Fed. (2nd) 232, in 1942, that evidence of prior accidents is admissible. In that case it involved facts briefly as follows:

* * * *

280 Our own Court of Appeals has ruled that prior accidents, if it throws light on the dangerous character of the location in question are admissible and the Supreme Court has done likewise.

281 I think that I have laid the proper foundation for the question to be asked. This witness has said that where the down escalator—

The Court: Of course, I anticipated just exactly what you were going to ask. Suppose, in order to help me make a ruling on it, you make an offer of what this testimony would show.

* * * *

286 The Court: All right. I will sustain the objection. That offer of proof does not tend to prove any accident that would be admissible under the rule announced.

* * * *

288 *Alvin M. Beals*

* * * *

Direct Examination

Mr. Wood:

Q Will you please state your full name? A Alvin M. Beals.

* * * *

Q Where were you employed in the year 1933, if
289 you recall? A At the Hecht Company.

Q When did you go to work for the Hecht Company, Mr. Beals, if you recall? A About the fall of 1933.

Q How long did you continue to work for the Hecht Company? A Until the spring of 1940.

Q And in what capacity did you work for the Hecht Company? A I was with the auditing department in the front accounting division.

Q Did you in that capacity have occasion, in the course of going in and out of the store several times a day, going in to work and to luncheon, and what not? A Yes, sir, I did.

Q I will direct your attention to the fall of the year 1938—I will withdraw that.

I will ask you whether or not you ever witnessed any accident at the bottom of the main floor of the down escalator in the Hecht Company store.

Mr. Canfield: The same objection, if the Court please.

The Court: Well, we have got to go through the same procedure, let the jury go out.

[The jury retired from the courtroom.]

* * * *

290 The Witness: Shall I answer that now?

The Court: Yes, go ahead and answer that question.

The Witness: Yes. I did.

By Mr. Wood:

Q Did that deal with the down escalator from the second to the first floor? A That is right.

Q Will you fix the approximate date as best you can that that occurred? A Well, it was about—I think it was in the fall of 1938.

Q Did you witness it yourself? A Yes, sir, I did.

Q Will you please tell us whether or not it involved a child? A It did.

Q About how old was the child? A Approximately three years old.

Q Will you tell us whether any portion of the child's person was caught in the escalator at the bottom of the down escalator from the second to the first floor? A Yes, sir, it was.

Q What part of the child's person was caught in the escalator? A His finger, I don't know whether it
291 was the left or right hand, but it was a finger.

Q Will you please tell us where that was caught in the escalator. A It was caught, I believe they call it a plate, where the steps go under the floor as they straighten out and disappear under the floor.

Q Where the step as it straightens out meets the comb plate, which is stationary, between those two steps, is that where the child's hand was caught? A Yes, as it disappeared under the floor.

Q Did you see the child's hand caught yourself? A Yes, sir, I was standing some distance from it, I saw—I heard the child scream and I saw as I turned, I saw the efforts of the mother to release the hand from the escalator at that time.

Q What did you do? A I immediately ran over to her assistance.

Q Then what did you do? A Before I got to the child the mother—there were quite a few people gathered around—

Q Yes. A By the time I reached her I knew that I could not help them, so I got down on my hands and knees and stopped the escalator.

292 Q You stopped the escalator? A Yes, sir.

Q Did you see Mr. Bray, the chief engineer of the Hecht Company there that day? A Not at that time, no, sir.

Q Did you see him later? A Yes.

Q How long after you went to turn it off did you see Mr. Bray, approximately? A Well, approximately, I

would say a very few—half a minute after I had turned it off.

Q When he got there, what, if anything, did you say to him or did he say to you? A Well, when he got there the crowd was still there, you could not very well get through it, so he also got down on the floor.

Q Was the child's hand still in the escalator? A Yes.

Q What did Mr. Bray do? A Mr. Bray then was down in a bent position on the floor and he said, and he repeated several times "Let's reverse it," and he said that is what I am going to do.

Q Was it reversed? A Yes, sir, he had some keys, he was looking for a key or something, I just don't know what it was, but then finally he lifted a plate and did
293 something and the escalator reversed.

Q Did the child's hand come out of the escalator then when it was reversed? A Yes, sir, I presume so, because he was then lifted and taken to the first aid room.

Q Look at Plaintiffs' Exhibit No. 3, which is for your information the down escalator from the third to the second floor at the bottom; you say that in this accident you witnessed, the child's hand was caught between the steps and the comb plate. Now I will ask you to point out for us, please, what portion, between this side and that side as this step met the stationary comb plate was the child's hand caught—about where, with reference to the side or the middle? A Do you mean the steps?

Q Yes. A At a point about right here [indicating.]

Q But definitely between the steps to the side and the comb plate, is that correct—this refers to the comb plate—

A Yes, sir.

Mr. Wood: I think that is all.

The Court: Do you wish to interrogate him?

Mr. Canfield: Yes, I do, if the Court please.

The Court: All right.

By Mr. Canfield:

Q You say you were in the auditing department, Mr. Beals? A Yes, sir.

Q On which floor? A It was on the fourth floor, I think. I think it was in the Second National Bank—did you say whether it was on the fourth or the third floor?

Q And this was in the main building, was it not? A Yes, sir.

Q What brought you over there that day? A I think I was picking up some cash reports that did not come up to us that day.

Q From whom? A The men's furnishings department.

Q The men's furnishings department, that is right on the extreme right-hand side of the old building, is it not? A Well, at that time it was on the main floor and had an entrance connected with Seventh Street.

Q Isn't that at least a hundred and fifty feet from the escalator? A I would say approximately forty feet from the escalator.

295 Q And you were using the escalator to get down to the men's department? A That is right, yes, sir.

Q What time of the day did that happen? A I believe it was in the morning.

Q Is that your best recollection? A Well, I say that because I usually picked up any of these missing reports in the morning, I would say between 10:00 o'clock and noon.

Q Now, you did not see the accident, you don't know how the child was caught, do you; you don't know— A No, sir, I don't.

Q You haven't any idea as to whether the child coming down the escalator was playing or not? In other words you don't have any idea at all as to how the child was caught, do you? A No, sir, not up to the time he was caught.

Q Your attention was directed to the thing by what?

A By the child's screams.

Q Now, how far away from you was the child when you heard it scream? A About the same amount, I suppose, because I was at the bottom of the escalator, to where I was standing—

Q Sixty feet, about that? A About thirty to forty feet.

296 Q All right. When you got over there what part of the child, would you say, was caught in the mesh of the comb plate? A I know the hand was caught, I don't know just what part of it was caught, I know the hand was caught from the action of the child and the action of its mother.

Q You shut the escalator off yourself? A Yes, sir, I did.

Q What then was done with the child? A When they picked the child up and carried it around I could see the blood on the hand, I could not see exactly what damage was done.

Q No missing part of the finger, the finger was not avulsed or torn, was it? A I could not see anything but the blood, I don't know how badly smashed the finger was, I would say the finger was still on, if that is what you mean.

Q How deep was the finger encased in the hole between the comb plate and the step? A That I could not answer.

Q Now I understood you to say when the escalator stopped Mr. Bray appeared on the scene. A Yes, sir.

Q Within a few moments, you say? A About that.

Q Had you ever seen him anywhere on the floor
297 before that thing occurred? A No, sir.

Q Do you know if anybody called him? A No, sir, I don't.

Q When he got there and put the key, you say he had to lift up a plate to get the thing in reverse? A Yes, sir.

Q Tell us how he did that. A How he lifted the plate?

Q Yes. A Well, there is a small plate there that covers the button—

Q Covers what? A The button or something else, I just don't know what he did, he had to use a key or something, some instrument to reverse it.

Q Did he take the plate out? A No, he lifted the plate.

Q He lifted the plate? A He had to lift the plate up the same as I had to lift it up to stop it, I mean, that is, it is all there, in the same position.

Q Well, he did nothing more than you did to stop it.

In other words, this plate he lifted was identical
298 with what you did to stop it? A I stopped it, he had to reverse it.

Q I see. So far as taking the plate out, he did nothing more than you did?

Mr. Wood: He didn't say that, I object.

Mr. Canfield: I am cross-examining.

Mr. Wood: I know, but he didn't say he took any plate out; he said he lifted it up.

By Mr. Canfield:

Q In lifting the plate up he didn't do anything more than you did? A No, sir.

Q Did you close the plate after you stopped it? A Automatically, I imagine, it went down in its position.

Q That was just simply lifting the thing up and putting the key in, was it not? A Yes, sir.

Q Up to that time you could not get the finger out? A No, sir.

Q Did you go up to the infirmary with the child? A No, sir, I didn't.

Q Do you remember the child's name? A No, sir.

Q Did you give your name to the store authorities as being a witness? A No, sir, I did not.
299

Q Do you know how Mr. Wood got your name?

A Yes, sir, I do.

Q How? A Mr. Wood got my name?

Q That is correct. A I know Mr. Jacobsen.

Q You are a friend of Mr. Jacobsen? A Yes, sir.

Q How long? A I knew him in the Service approximately four to six months.

Q A very intimate friend? A No, sir.

Q Well, now, how did you bring yourself to Mr. Jacobsen's attention? A At the time I was stationed at Philadelphia Navy Yard I had came home to visit my folks here, I went over to call on my friend who worked there, and was stationed there, and I was told about this accident by one of these fellows that was on duty there and I said, "That's funny, I recall seeing a previous accident a few years ago" and I told him about that happening. That friend that I mentioned it to evidently told Mr. Jacobsen who got in touch with my folks and the next time I came down on leave they told me to get in touch with Mr. Jacobsen.

Q As I understand it, although you were a witness to the accident you did not give your name to any Hecht authorities? A That is right.

Q That was a rule at that time, if you witnessed an accident you were to make your name known to the management? A Not that I know of.

Q Hadn't you been instructed on that? A No, sir.

Q Wasn't it established in the safety rules— A I don't recall that they had any at that time.

Q Did Mr. Bray know you at that time and know that you were an employee? A Yes, sir.

Q Who was he floor manager? A Mr. Katz.

Q Mr. Jack Katz? A Yes, sir.

Q Did he see you there? A I am not sure he did. He arrived there just a little before I did.

Q Well, he was there while you were there, was he? A Yes, sir.

Q You say you tried to extricate the child? A

I did not try to do anything with the child, I did not get to the child, I shut the escalator off.

Q He did not ask you for a statement? A No, sir.

Q At no time did you give a statement to anybody about the accident? A I think I mentioned it casually to some friend in the store, but I did not make any statement to anyone, no, sir.

Q I am concerned with persons representing the management—that was rather important evidence to you, the fact that a child was hurt was rather important to you? A Yes, sir.

Q You were an employee of the store? A That is right.

Q Did it occur to you that there might be a claim made? A Yes.

Q Nevertheless you did not give your name to anybody? A No, sir, I didn't.

Q As having been a witness to this accident? A I never heard anything more about the case at all. I was up in the first aid room and talked to the nurse,
302 and she said that she didn't mention it, neither did I.

Q Did you go to the first aid room on the day of the accident? A No, sir.

Q Did you ever tell the nurse you had seen this other accident? A She told me—

Q You had not gone up with the child, had you? A No, she came down from the first aid room to the first floor about the time they got the child out.

Q Was that Miss Haas? A I don't recall the name, I would know her if I saw her, I don't recall the name.

Q Did the nurse discuss with you the accident? A No, sir.

Q Did she know you were a witness? A Yes, sir.

Q She didn't ask you for any statement? A No, sir.

Q Did she tell you she put your name down in a report book? A Did she tell me?

- Q Yes. A No, sir.
- 303 Q Did you ask her to? A No, sir.
- Q Have you had any correspondence with Mr. Jacobsen about this case? A Correspondence?
- Q Yes. A No, sir.
- Q Has he written you anything about it? A No, sir.
- Q Have you seen him since you came back this week?
- A Yes, sir.
- Q Where did you see him? A I had luncheon with him, I knew him, I knew his wife, I had luncheon with him and his wife and child.
- Q Do you know where they are staying? A No, sir.
- Q Just been to lunch with them that once? Yes, sir.
- Q When was that? A Last week, I think it was Tuesday.
- Q Whereabouts? A We had luncheon at Fifteenth and New York Avenue, nearby where I work, I work at 1419 H Street.
- Q Who do you work for now? A National Business Traffic Association.
- 304 Q At 1419 H Street? A Yes, sir.
- Q Can you fix the time that this occurred in 1938?
- A I think it was in the fall, in cold weather, that is as I recall it, I think I had a topcoat—
- Q A topcoat? A Yes, sir.
- Q How was the little child dressed? A I think he had a small play suit, she had his coat in her hand.
- Q I beg your pardon. A She had that coat on her arm, I think.
- Q The mother had his coat? A That is right.
- Q Was any portion of the clothing caught in the escalator? A No, sir.
- Q Just the finger? A Yes, sir, so far as I know, I mean, I don't know, I didn't make an examination of it or anything.
- Q No part of the finger was taken off? A That I could not say.

Q Well, you saw it, didn't you? A I saw the bloody finger, yes.

Mr. Wood: He has answered that once.

The Witness: I could not tell you whether the
305 finger was cut bad enough to be taken off, whether it was damaged enough to come off.

By Mr. Canfield:

Q Did you examine it? A No, sir, as soon as the child's hand was released he was picked up and immediately taken to the first aid room.

* * * *

Redirect Examination

By Mr. Wood:

Q You have said that Mr. Bray was there. Did Mr. Bray ever ask you later for any statement of what you saw there, or not? A No, sir, he didn't.

Q Did Miss Haas at the first aid room ever make—she knew where you were located in the store, didn't she? A Yes, sir.

Q Were you ever asked by anyone in the Hecht store to make any statement subsequent to that? A No, sir, I was not.

306 Q Mr. Katz saw you there, you think? A Yes, sir.

Q He didn't ask you later, did he? A No, sir.

Q Mr. Bray knew you turned the stop button off, didn't he? A I would not say for sure, but I was still down at that part of the escalator when he came there trying to get the people away so that he could get to the place.

Q You said you recently, since the Jacobsens came down, went to luncheon with them, didn't I also attend that luncheon? A Yes, sir.

Q Didn't I get in touch with you about your knowledge of the prior accident about a year ago last February or December—a year ago last December or February? A Yes, I received a letter from you, yes, sir.

Q Was Mr. Jacobsen present at all at that time? A No, sir.

Q And did I ask you what knowledge you had of a prior accident happening at the Hecht Company? A Yes, sir.

Q You were not immediately connected with the same branch of the Navy that Mr. Jacobsen was, were you?

A For a small period of time, not at the time that this accident occurred, no, sir.

307 Q In November of 1945, you were then in Philadelphia, I think you said? A Yes, sir.

Q Then one of his friends just happened casually to tell you about Mr. Jacobsen's child, Betty, having this accident? A That is right.

Q And you told him you had witnessed a similar happening? A That is right.

Q On the first floor? A Yes, sir.

Q And in some ways that friend made it known to Mr. Jacobsen, so far as you know? A So far as I know, yes.

Mr. Wood: I think that is all.

The Court: All right, now gentlemen, that puts it up to me to decide whether evidence of this accident should be admitted or not. As I understand the way the testimony shapes up here, the whole contention of the plaintiff was that the defendant was negligent in having as an escalator the one which this plaintiff rode on, such an aperture between the disappearing steps and the comb plate as to make it dangerous, at least dangerous to the child who would fall or get its hand in contact with
308 the aperture, and that is the alleged negligence here.

Now we have had evidence tending to show that the aperture here is at least larger than that which is on some of the other escalators in the store, what has been called the more modern, those more recently installed. As to whether or not this one was dangerous, aside from the fact—as to whether or not the other one was less danger-

ous and safer, the plaintiff now seeks to show that that was dangerous in that it not only caused the injury here, but one identically like it, only on the first floor, caused a similar damage to a child's hand.

Now with that and nothing more, it seems like I ought to hear from the defendant as to why that would not come within the rule announced by the Court of Appeals that a dangerous condition as evidenced by a previous accident may be shown. I think it is your move, Mr. Canfield.

Mr. Canfield: Yes, if the Court please. This man does not have the slightest idea how this accident occurred.

The Court: No, all he knows is that a child's hand was caught in this aperture. It does tend to show that the aperture is sufficient to catch a child's hand.

* * * *

309 The Court: I think your answer carries with it something of the same premise that I held previously was not controlling. I don't think that you have got to show that there was a mechanism that would absolutely insure against it happening. I think that it is sufficient, at least, as far as the admission of evidence is concerned, to show that there are devices which would minimize the hazard that happened, such as, for instance, the closer meshing in the comb plate or the disappearing step. I do not say that it is negligence in every case, either the one that this gentleman just testified about or the instant case. I am somewhat of the view, however, that

310 this is admissible to show that this type of escalator step and comb plate do catch a child's hand, that it had happened before, as being one of the things to be considered by the jury in helping it determine whether or not it was negligent construction. I do not think it shows in itself negligence any more than the condition of the landing platform shows it in the case which has been cited, but they held it was admissible and I certainly am inclined to rule that it is admissible here on the factual question as to whether or not defendant had prior knowledge.

Let the jury come in and I will excuse them for lunch.

* * * *

311 *Direct Examination—Resumed*

By Mr. Wood:

Q I think, Mr. Beals, I asked you the question whether or not, while you were working there at Hecht's you witnessed an accident that occurred on the main floor, in other words the down escalator from the second to the first floor where it meets the main floor. A Yes, sir.

Q Did you witness an accident there? A Yes, sir, I did.

Q Will you tell us, Mr. Beals, whether that accident involved a child? A Yes, sir.

Q Do you recall the age of the child? A Approximately three years old.

312 Q What attracted your attention to the accident?

A The child screaming.

Q After you heard the screaming of the child, did you then look around? A Yes, sir, I turned around and saw that the child was caught in the escalator.

Q What did you see then when you turned around? A The child had its back toward me and the finger seemed to be caught, or some part of the hand was caught in the escalator, his mother was trying to free the hand.

Q What did you do then? A I went over as quickly as I could to assist her, but before I could get there, there were several people there, the only thing for me to do was to stop the escalator.

Q Did you stop the escalator? A I did.

Q In stopping the escalator, that put you in close proximity to the child and mother, did it not? A Yes, sir.

Q Will you please tell us, point out on Plaintiffs' Exhibit No. 3—this is a picture, a photograph of the down escalator from the third to the second floor showing the bottom of the down escalator. Was the down escalator

when you worked there at Hecht's from the second to the first floor the same kind of escalator as the one
313 from the third to the second? A It was.

Q And the steps as they levelled off and went in under the floor of the comb plate, which was stationary, is that right? A That is right.

Q Now, pointing to this point here, which is the floor, and you see the steps in that photograph as it approaches the comb plate, will you point out on this photograph for the Court and jury, if you please, approximately where the hand was caught. By that I mean was it the right side or the left-hand side or in the center of the step as it meets the comb plate? A It was approximately this position here [indicating.]

Q You are now pointing to about the center? A About the center, immediately to the right.

Q So that it was in between the step and the comb plate? A Yes, sir.

Q After you turned the escalator off what next happened? A Well, as I say, there was quite a crowd there, and I could not get to the child or the mother, and I could not see too well, but approximately half a
314 minute to a minute, Mr. Bray, the engineer, arrived.

Q What did you do at the time when you turned off or stopped the escalator? A I had to get down—I don't recall whether I got down on my hands and knees or just stooped and lifted the plate and pushed the stop button.

Q What, if anything, did you do with that plate? A I raised it up, and there was a metal button, I raised that up and pushed the button.

Q Then the escalator stopped? A Yes, sir.

Q Was the child's hand still caught in the escalator when it stopped? A It was.

Q When Mr. Bray got there did you say anything to him or did he say anything to you? A I requested that he reverse the escalator.

Q Why did you request that he reverse it? A The child's hand was still in there in a way so that he could not get it out so I asked him to reverse it.

Q What, if anything did Mr. Bray say? A He said, "That is what I am trying to do." He was looking for a key or some instrument then which was used in the '34 escalator.

315 Q When you refer to Mr. Bray, you mean the chief engineer of the Hecht Company who was there at the time when you were working there? A I assume that is his title, he was the engineer so far as I know.

Q You knew he was the chief engineer? A Yes, sir.

Q Did he finally reverse the escalator? A Yes, sir.

Q About how long did that take him to reverse it? A I would say about half a minute.

Q Then what happened, what was done with the child at that moment? A When the escalator was reversed, he was immediately picked up and taken up to the first aid room.

Q Before he was taken to the first aid room did you have an opportunity to observe any portion of his body or his person? A I saw his hand.

Q What did you see? A Well, it was covered with blood, I could not tell you the extent of the injury or if one or more fingers were injured.

Q Was there quite a number of people accumulated around the base of the escalator? A Yes, sir.

Q Did you go up to the first aid room with the child? A No, sir, I didn't.

Q Do you recall who took the child up to the first aid room? A If I recall correctly, I think Mr. Katz carried the child.

Q Who is Mr. Katz? A He, at that time, I believe was the first floor floor manager.

Q Do you mean Mr. Jack Katz? A I think Jack is his first name.

Q Were there any other officials from the Hecht Com-

pany there at that time, and if so whom? A The nurse from the first aid room arrived about the time they freed the child's hand.

Q Do you recall her name? A No, I don't.

Q They saw you there, of course? A Yes, sir.

Q Did you go at any time that day to the first aid room after that child was taken upstairs? A On that particular day, no, sir.

Q Do you know Mr. E. S. Jacobsen, one of the
317 parties to this case? A Yes, sir, I do.

Q Where did you learn to know Mr. Jacobsen first? A I met him while on duty in the Navy.

Q Where were you located in the Navy? A At the time I met Lieutenant Jacobsen it was in a building, Building S here in Washington.

Q On November 15, 1945, the date of this accident, were you in the Navy then? A Yes, sir.

Q Where were you stationed at that time? A Philadelphia Navy Yard.

Q Did you have occasion subsequent to that date to come to Washington for any purpose? A I had been given several days on a week end.

Q Where was your home then at that time—it was still Washington, was it not? A Well, my folks have always lived here.

Q Did you have occasion subsequent to November 15, 1945, to visit your home? A Yes, sir.

Q When did you—did you go back to the department that you had been previously located when you met Mr. Jacobsen? A I visited my folks at their apartment.

318 Q I mean, did you go to the Navy Department also? A Oh, I am sorry, yes, sir, I did.

Q Why did you go there? A Well, there were some fellows I knew, and they happened to be located there at that time.

Q As a result of going down did you later talk with Mr. Jacobsen about the accident that you have related to

us? A I talked to him approximately three weeks or a month later.

Q After that? A Yes, sir.

Q Did you tell Mr. Jacobsen what you have told us here today, approximately, as to the accident you witnessed?

A I told him I had witnessed a similar accident.

Q And then did I get in touch with you after that at Mr. Jacobsen's direction? A Yes, sir.

Q Do you recall about when it was that I got in touch with you? A The first part of '46, I think it was.

Q When did you leave the Hecht Company—I believe you stated it, if you don't mind telling us again. A 1940.

319 Q 1940? A Yes, sir.

Q I think that is all.

Cross-Examination

By Mr. Canfield:

Q Mr. Beals, when you worked for the Hecht store, you were in the accounting department, were you not? A Yes, sir.

Q And on what floor was the accounting department?

A It was the third or fourth, located in the Second National Bank.

Q The Second National Bank Building? A Yes, sir.

Q Now that would be one or two doors from the main building, would it not? A It adjoins the Hecht Company, I believe on the 7th Street side.

Q On the 7th Street side, and when you got to your work in the auditing department you took the elevators or the escalators? A Usually the elevator, or I walked up—too early for the escalator to be running.

Q I beg your pardon. A Too early for the escalator to be running.

Q When you come out to your lunch how would you go out? A Well, I either used the escalator or the elevator.

320

Q As a matter of fact, the escalator was a considerable distance from that department, wasn't it? A That is right.

Q And the elevator was right close by, was it not? A Yes, sir.

Q Why would you walk to the escalator if the elevator was close by? A Because the entrance to the Hecht Company from the Second National Bank Building, as I recall, going into the Hecht Company immediately at the top of the floor.

Q What was that? A I am sorry, I am trying to remember the location—you know, it has been quite some time since I worked there—you had to come from the old building to get into the main floor, sometimes we would go down to the second floor and go down. It didn't matter which way I went down.

Q As a matter of fact, you would come in where the men's wear is, wouldn't you? A I could, yes, sir.

Q That was at least a hundred and fifty feet from the escalators, was it not? A The men's wear?

321 Q Yes. A That is on the second floor, that is not on the first floor.

Q Where is that on that floor? A I would say the entrance to the men's wear is about fifty feet from the top of the escalator.

Q Now when you would come in in the morning to work, you would come in on the 7th Street side, would you not? A Yes, sir.

Q I am referring now originally to the old Hecht Building, not the Second National Bank Building, you would come down to the men's wear department and you would take the elevator to go to work, wouldn't you? A No, I would take the elevator from the first floor—you don't come to the men's department.

Q All right, the men's wear department is off the level, isn't it, it is in a floor—basement? A That is right.

Q Isn't that the way you would come in? A To get to the third or fourth floor?

Q To get to wherever you worked? A Well, to get—

Q Isn't that the way you would come in? A I usually would go up to the third or fourth floor and use the elevator or the stairway in back.

322 Q All right, you would come down, to go out you would come down the same way, wouldn't you? A Usually.

Q In other words, you didn't use the escalator? A Not to and from lunch, no, sir.

Q All right. Now this accident, where were you in the store when this matter came to your attention? A In the men's furnishing on the first floor.

Q On the first floor and the men's furnishings is over in the subbasement, is it not, right off the store level? A Yes, sir.

Q All right. How far—I think you said fifty feet. A It is between thirty and forty feet from the point of the accident to where I stood.

Q Isn't it a fact it would be less than fifty feet to the up escalator and a good seventy-five feet to the down escalator? A No, sir.

Q From the nearest part of the men's furnishing? A No, sir, it would be the reverse.

Q When the escalator got down to the first floor and straightened out, it finally discharges you where? A Through the men's room.

323 Q What were you doing there on this occasion when it came to your attention? A If I can recall correctly, I was picking up an incomplete report that had not been received—I am not too sure about that.

Q You had come down the elevator, hadn't you? A That I don't recall.

Q You were talking to somebody about your immediate business, weren't you? A I was talking to a friend in the men's furnishings. What we were discussing I cannot recall.

Q You were talking to whom? A To a friend of mine.

Q A friend? A Yes, sir.

Q Then your attention was, you say, called by this child screaming. A That is right.

Q You immediately ran to the site of it, is that right? A Yes, sir.

Q You saw this child at the foot of the escalator? A Yes, sir.

Q You did not see anything which led up to the child, the manner in which the child become en-
324 meshed in the escalator, did you? A No, sir.

Q You do not have any idea how the accident occurred? A No, sir.

Q You say there were a number of people there? A That is right.

Q What were these people doing? A Most of them were standing around, some of them were trying to help get the child out.

Q Was the child's mother there at the time? A Well, I assume it was the child's mother; there was a woman right there with the child.

Q How many people would you say were there? A It is hard to say, I would estimate six to eight.

Q Now, the first thing you did, of course, was to stop the escalator, was it? A The first thing I did was to try to get the child away from the escalator.

Q Did you try to pull the child away before you stopped— A No, sir.

Q What did you do first? A I went to the escalator because I could not get to the child.

325 Q You had not been instructed in the workings of it, as part of your duties, had you, that is, the escalator? A No, sir.

Q Had you ever seen it stopped in this store before? A The reason I knew—

Q Just answer my question. A Yes, sir.

Q You knew there was a switch there, and you knew the purpose of it was to shut off the escalator? A That is right.

Q It was where it could be seen, was it not? A I believe there was a stop button near there on the bottom, yes, sir.

Q Anybody could see it, couldn't they? A If you are looking down, yes, sir.

Q And all you did was to push your finger in, was it not? A As I recall I had to lift a little plate and push it in.

Q Lift the plate? A Lift it up.

Q You didn't have to take it off? A No, sir.

Q Well, a simple gesture wasn't it, just lift up
326 and push your finger? A Yes, sir.

Q As soon as you pushed your finger, the escalator stops, does it not? A That is right.

Q Immediately. Now, when the child was there in that position, you said its right hand was caught? A If I recall it was the right hand, yes, sir.

Q And when Mr. Bray got there he reversed the escalator, is that correct? A That is right.

Q That released the child's finger? A So far as I know it was immediately released, upon being released from the escalator they picked the child up.

Q Now you saw the child, did you, when it was picked up? A Yes, sir.

Q Did you examine the child's finger at all? A No, sir.

Q Did you see any evidence of injury? A I could see the hand, yes, sir.

Q Saw some blood on the end of its finger, didn't you? A The hand was fairly covered—

Q The blood was coming down the tip of the
327 finger, is that right? A I don't know where it was coming from, it was all over his hand, I could see the blood on his hand.

Q Did you see the finger? A I saw the finger, yes, sir.

Q Did you see any damage to the finger? A I could not very well see it, because it was bleeding.

Q Did you examine the child's hand? A No, sir.

Q Were any part of the fingers missing? A I did not do any examination, it was not my duty to do that, they wanted to get the child to the first aid room.

Q What is your recollection of the extent of the damage, did you see anything other than blood running from the fingers? A No, sir.

Q That was all you did see, was it not? A Yes, sir.

Q You took the child upstairs? A No, I didn't take the child upstairs.

Q Was there somebody else? A Yes, sir.

Q You had worked in that store for some time, 328 had you not? A Yes, sir.

Q Did you make known to the management that you had witnessed the accident or participated in it? A No, sir, I didn't.

Q That was a rule of your employment, wasn't it? A Not that I know of.

Q You never heard of the fact that if you saw an accident of any kind in the store you were to report immediately to the management and give a statement as to what you knew? A No, sir.

Q Never heard of that? A No, sir, I thought the authorities were there, they should take care of it.

Q You never gave your name to anybody, did you? A No, sir.

Q Do you know the name of the child? A No, sir, I don't.

Q Did you make any inquiry to get his name? A No, sir.

Q That would have been part of your duty, Mr. Beals, would it not? A Not that I can see, no, sir.

Q From that time until this, so far as you know,

329 you have never given any statement to the store about that accident? A No, sir.

Q Now, when did you first meet Mr. Jacobsen? A I think when we moved over to the S Building was about the first I had any contact with him.

Q That was the early part of 1945? A Yes, sir.

Q He was then in the Service? A Yes, sir.

Q And you were in the Service? A Yes, sir.

Q You and he got to be quite intimate, did you not?

A No, sir.

Q Were you friendly? A We were friendly, yes, sir.

Q Did you visit each other? A No, sir.

Q What was your rank? A Chief Petty Officer.

Q You were under him? A No, sir.

Q At no time? A No, sir.

330 Q You were then transferred, eventually, were you not? A That is right.

Q When did you leave for Philadelphia? A September 20th, 1945.

Q September 1945, during that time had you at any time served under Lieutenant Jacobsen? A No, sir, he was in the Public Relations Office, that is where I was, taking care of certain matters that pertained to leave and other matters which I don't know, but he was not in charge of my division.

Q But at any rate, you were not intimate friends? A No, sir.

Q And you saw nothing of each other socially? A No, sir.

Q Now there came a time when you were in Philadelphia, did there not? A Yes, sir.

Q Did you know about this accident? A That is right, when I visited Washington.

Q I beg your pardon. A I was visiting Washington at the time.

Q You were visiting Washington at the time? A Yes, sir.

331 Q And you went back to the Navy Department?

A That is right.

Q Did you go to see Lieutenant Jacobsen? A No, sir.

Q Did not see him at all? A No, sir.

Q You didn't know anything at all about his child being hurt? A Not until I was told at that time.

Q Told at what time? A I was told at the time I visited the Navy Department.

Q You were told at the time you visited the Navy Department? A Yes, sir.

Q Then you sought out Lieutenant Jacobsen? A No.

Q You did not? A No, sir, I didn't.

Q How did he know you knew anything about this other accident? A Well, the friend that I told told Lieutenant Jacobsen at the time, I had gone back to Philadelphia, but Lieutenant Jacobsen called me at my home or my folks home.

Q In other words, you told a friends of yours? A That is right.

332 Q That you had seen this accident? A That is right.

Q Then later Lieutenant Jacobsen got in touch with your—with you by phone? A Got in touch with my folks.

Q Got in touch with your folks. Did you contact him afterwards? A Yes, sir, about three weeks later, I believe it was.

Q Did you write a letter? A No, sir.

Q Did you talk to him over the phone? A I did.

Q And told him about the accident? A That is right.

Q Now since you had brought this to his attention, did you become intimate? A No, sir.

Q Did you return to Philadelphia? A I did.

Q Have you seen him since he returned to Washington? A When he returned this time, yes, sir.

Q How many times have you seen him? A Well, I have seen him here.

333 Q Where was that? A In court.

Q You have seen him in court? A We went out

and had lunch together —

Q Did you give him a written statement? A No, sir.

Q Did you give counsel a written statement? A My written statement?

Q Yes. A No, sir.

Q Did you give Mr. Wood a written statement? A Not a written statement, no, sir.

Q Did you give anybody a written statement? A No, sir.

Q From the time that you heard this child scream until you ran over and cut off the escalator, how long would you say that took you? A It would not take over about a minute — one-third of a minute.

Q How many seconds, would you estimate? A About one-third of a minute.

Mr. Canfield: I think that is all, thank you.

Redirect Examination

By Mr. Wood:

334 Q Mr. Beals, you at no time have been in close friendly terms with Mr. Jacobsen, have you? A No, sir, I have not.

Q How did you learn he was in Utah? A Through you.

Q When you went to lunch with him since he came back, it was very recently he went to lunch with you? A Mr. Jacobsen, his wife, daughter and myself —

Q Were there? A Yes.

Q When you came back from Philadelphia and visited your home, and you went over to the Navy Department, you went to the same department you had worked at before to see some of your friends? A Yes, sir.

Q Is that right? You were not going over there to see Mr. Jacobsen at all, were you? A No, sir.

Q While over there you talked to someone who knew Mr. Jacobsen? A That is correct.

Q And he told you about Mr. Jacobsen's little girl having an accident at the Hecht Company store in connection with an escalator, didn't he? A Yes, sir.

Q Then you told him —

Mr. Canfield: If the Court please, I do not object
335 to the question, but I think Mr. Wood is testifying.

The Court: You are leading, aren't you?

Mr. Wood: Well, it is all in the interest of saving time.

The Court: Ask him, don't lead him.

Mr. Wood: I will try not to. I do have to direct his attention to what he has said on cross.

By Mr. Wood:

Q Mr. Beals, you testified that when you came back to the Navy Department someone told you — in the question put by Mr. Canfield you left the impression that you told Mr. Jacobsen first about the accident, did you? A No, sir.

Q Who did you tell about it first? A The fellow on duty there told me about his accident and I told him that I recalled —

Mr. Canfield: If the Court please, we do not want any conversation with that fellow.

Mr. Wood: You asked him —

Mr. Canfield: I didn't ask him about any conversation.

Mr. Wood: Yes you did, you asked him something about what did he tell them.

The Court: Well, it is perfectly clear from what the witness has testified to that it was made known to him by somebody that Mr. Jacobsen's daughter was hurt
336 and that he told that person about this other—that he has testified to. I mean, I do not see how there can be any misunderstanding on anybody's part as to what the witness has said in that connection.

Mr. Wood: If we could read the testimony back I could show Your Honor what I thought he said — of course, I could be wrong.

The Court: That is what you said, isn't it, Mr. Beals?

The Witness: Yes, sir.

Mr. Wood: I thought Mr. Canfield asked you on cross-examination if you told Mr. Jacobsen about it.

The Court: But you have asked him that question and the witness certainly made it clear that he told this man that he knew Mr. Jacobsen.

By Mr. Wood:

Q As a result of your having talked with the other man Mr. Jacobsen got in touch with you, didn't he? A Yes, sir.

Q Then after that, when you discussed it with Mr. Jacobsen, state whether or not I got in touch with you? A You got in touch with me, yes.

Q And you gave me the facts as you have given them here today as to what you saw of the accident on the first floor at the bottom of the escalator, is that correct?

337 A That is correct.

Q And I made notations of the information you gave me, is that right? A That is right.

Q Now you were asked a question by Mr. Canfield did you see blood coming out of the finger, and you said no, from the hand. A He said the end of the finger.

Q Yes, and you said no, you saw it all over the hand. A That is right.

Q Then a little later Mr. Canfield asked you the question, wasn't it a fact you saw blood coming from the finger, and I think you said yes. Now, what did you say with reference to the hand, where was the blood? A The blood was on the fingers and running down his hand. About that time, as I recall, a nurse from the first aid room arrived and they wrapped it up, or had something over it, a handkerchief or something.

Q Will you please tell us from the time you had this look at the hand after it was reversed by Mr. Bray, from the time you did look at it just about how long you had this look at it? A Not long, just as the child was being picked up in preparation to carrying it up to the first aid room.

338 Q Was it a boy or a girl, do you remember? A I don't recall.

Q They carried this child up to the first aid room immediately thereafter, is that right? A Yes, sir.

Q Now, were you ever asked after that by Mr. Bray, chief engineer, to give anyone in the Hecht Company a statement? A No, sir.

Q Were you ever asked by Mr. Jack Katz, the superintendent or floor manager, to give any statement to the Hecht Company concerning that? A Not that I can recall was I ever asked anything.

Q Were you ever asked by the nurse who was down there, you say, shortly thereafter, to give any written statement to her as to what had happened? A I was not asked to give any written statement, I think I did discuss it with her later.

Q When was that you discussed it with her? A Well, sometime within a week or two.

Q How did you come to do that? A I happened to be in the first aid room.

Q Then you were not asked for any written statement? A No, sir.

Q At no time were you ever asked by any officials
339 of the Hecht Company for a written statement, is that correct? A No, sir.

Q They knew your name, didn't they? A Yes, sir.

Q They knew the department in which you worked, didn't they? A Yes, sir.

Q What were your duties in that department? A We had a punch card account system, I worked on the machine.

Q When you say, if you recall correctly that you went down to pick up an incomplete report, that took you to the first floor, is that right? A Yes, sir.

Q Where did you go to get that report? A The men's furnishings floor, the cash register was there, and we needed something, I don't recall just what it was, but something we needed there. That report came off the cash register.

Q Was it in your official capacity on the day that you

saw this accident that took you near this down escalator from the second to the third floor? A Well, I was asked to go down and get it.

Q While doing that you heard this screaming? A Yes, sir.

340 Mr. Wood: I think that is all.

Recross-Examination

By Mr. Canfield:

Q What was the nurse's name, Mr. Beals? A I don't remember her name.

Q Have you any idea what her name was? A No, sir, I could identify her if I saw her.

Q What took you to the infirmary on this occasion? A I had a slight cold.

Q You say you discussed this accident with her? A Well, you could hardly call it a discussion. It was brought up, but nothing much was said about it.

Q Did you tell her that you had been a witness to the accident? A She knew that, she told me that.

Q You told her that? A She told me that.

Q By the way, how long did she get there after the screaming, at the scene of the accident? A The child, I think, had been picked up at that time. She came up — how long I could not very well remember the exact time.

Q Did you go and call her? A No, sir.

341 Q She just came up herself there? A No, we didn't see each other on the second or the third floor — I don't recall.

Q She came from the extreme far end of the building? A Yes, sir.

Q You haven't any idea how she got there? A No, sir, I was at the scene of the accident all the time.

Q You don't know who sent for her? A No, sir.

Q How do you fix it as 1938? A I said, as I recalled, I was not able to fix the exact year, but as I recall, it was about 1938.

Q Could it have been 1939? A I don't think it was that far back, no, I left in '40, I think it happened about a year and a half or two years before I left.

Mr. Canfield: Thank you.

Redirect Examination

By Mr. Wood:

- Q You have no doubt about seeing a hand in the escalator on the day you testified to? A No, sir.

Mr. Wood: That is all, Mr. Beals.

The Court: All right, step down.

[The witness left the stand.]

342 Mr. Wood: At this time, if the Court please, I would like to let the jury see those photographs that were offered of the new type escalator, Plaintiffs' Exhibits 6 and 7.

The Court: All right.

Mr. Wood: If I might have the other two exhibits to show the installation of 1934, so that they may see them all together.

The Court: All right.

Mr. Canfield: I may say, Your Honor, so I won't have to renew my objection to each part of these, it goes to the whole exclusion of that that sort of argument.

The Court: Of course, Mr. Canfield.

Mr. Canfield: Thank you.

Mr. Wood: These are Plaintiffs' Exhibits 6 and 7 of the newer type you have heard testified to.

If the Court please, I think at this point while they are looking at the pictures, the two pictures of the hand that were introduced as Plaintiffs' Exhibits 1 and 2 were not handed to the jury, I believe. May I take the same time and show them all the photographs?

The Court: All right.

[Plaintiffs' Exhibits 1 and 2 were submitted to the jury.]

Mr. Wood: I will call Mr. Jacobsen.

Thereupon

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S. Elmer Jacobsen

* * * *

Direct Examination

By Mr. Wood:

Q Will you please state your full name, Mr. Jacobsen?

A S. Elmer Jacobsen.

Q And you live where now? A Provo, Utah.

Q Before that, when did you return to Provo? A I returned — It will be two years ago this August, as I recall.

Q Before that, did you live in or near Washington? A Yes, I had been located here for some time.

Q About how many years, would you say? A Since 1933.

Q And directing your attention to November 15, 1945, where were you then employed? A I was employed in the Bureau of Supplies and Accounts in the Navy Department, Washington, D. C.

Q How long had you been there? A I had been connected there for approximately — well, it was in November, I think three years, just about three years.

Q And did you receive a call on the morning of November 15th, 1945 at your office? A Yes, sir, I did.

Q Who made that call? A Mrs. Jacobsen.

Q As a result of that call, where did you go? A I left immediately from the office where I was located in Hecht Building and went to the Children's Hospital.

Q And then, upon arriving at the Children's Hospital, who did you meet? A Well, first I met my wife and a nurse and some gentleman from the Hecht Company, and my eldest daughter and injured daughter.

Q At that time — say prior to that time, had you made attempts before coming to the Children's Hospital to locate your own physician? A Mrs. Jacobsen had attempted to

locate the physician from the Hecht Company. As a matter of fact, I think the Hecht Company even called for her while she was on her way to the Children's Hospital.

Q Who was your physician at that time? A Dr. Clifford White had been our personal physician for the children.

345 Q Was Dr. Clifford White able to come to the Children's Hospital? A No, he was not.

Q Will you tell the Court and jury whether you knew Dr. Coffey before that time at all? A I did not.

Q How did you meet him on that day? A I ran into Dr. Coffey, as I recall at the hospital.

Q Where was he when you happened to run into him? A Well, as we were waiting trying to line up a doctor, we tried to contact Dr. Eng, and he sent word back he would be able to be there in approximately an hour. It was after information to that effect, as I recall, that we contacted Dr. Coffey right there in the hospital.

Q State whether or not he was in uniform? A He was.

Q And were you? A I was.

Q What, if anything, did you do with reference to your child, Betty-Lynne, and having Dr. Coffey do anything about it? A I made mention to the doctor that she had had a very grievous accident, the youngster, and asked if he was in a position to do something about it for us and he decided to get ready at that time —

346 Q And what was done thereafter? A He came in, as I recall, and the bandage was taken off, and he looked at the hand.

Q You were there when this happened? A I was there.

Q Go ahead. A The bandage —

Q After looking at the hand, what, if anything, did Dr. Coffey do? A Dr. Coffey looked at the hand and asked how did she hurt it and then he finally started to treat it.

Q Yes. A When he tried to open up the hand the

finger was hanging down by a small piece of skin.

Q Yes. A And the back part was wide open.

Q What did he do? A He said he was going to take her immediately to the operating room which he did.

Q Was that done? A It was.

Q Did you remain there in the hospital? A Yes, I did.

Q About how long after that was it that the child was taken from the operating room back to her room?

347 A That is right.

Q How long was that? A Well, probably half an hour to an hour, something like that.

Q Then was she returned to the hospital room? A That is right.

Q Did Dr. Coffey continue to treat your child, Mr. Jacobsen? A Yes, he did.

Q After that? A Yes.

Q Where did he treat your child immediately subsequent to leaving the Children's Hospital? A Immediately subsequent to that she was treated at the Navy Dispensary in the Main Navy Building on Constitution Avenue.

Q About how long, if you recall, did she remain in the Children's Hospital — about how long did she remain in the Children's Hospital after Dr. Coffey operated on her? A About five days, as I recall.

Q Did you, at my request, arrange to have pictures taken of your daughter's hand at the Navy Dispensary? A I did.

Q When was the arrangements made, on what
348 particular occasion, if you recall? A Well, they were arranged for at the time the doctor was taking the bandages off, in other words, we knew in advance he was taking the bandages off that day, and arrangements were made to have a photographer there to have him take a picture of the hand.

Q Were these pictures that have been marked Plaintiffs' Exhibits 1 and 2 made at the Naval Dispensary with

the permission of Dr. Coffey, at my request? A Yes, they were.

Q After your daughter left the hospital you continued to live in Washington, I think, over in Virginia, didn't you?

A We lived in Arlington, Virginia, up until the time we left in August of '46.

Q '46? And immediately after going home, will you please tell the Court and jury what, if in any way the injuries to your daughter's hand restricted her in and about the house or home, or near the home? A Well, there were occasions when she bumped her hand and apparently it was very sensitive, and there have been occasions which have arisen when the child would come into the house when she had been playing with youngsters — many of the youngsters did not want to play with her because a finger was missing, they thought it was funny, something like that.

349 Q How have you in the house noticed signs — I will withdraw that.

Since going to Provo, has your daughter been in school this past year? A Yes, she has been in kindergarten this past year.

Q Have you, yourself, while at home, ever noticed while out in Provo, anything with reference to how this injury has affected your daughter there? A Well, as I indicated, on several occasions we have had the daughter complain when she came home from school that other youngsters in the yard, they never seemed to desire to play with her, because of the finger, and it certainly has upset her, there is no question about that.

Q What, if anything, have you done, Mr. Jacobsen, you and your wife, concerning the treatment or future care or attention to the hand? A Well, we have followed the doctor's advice as to rubbing of the hand with a special oil to make the skin more pliable, we have also followed the doctor's advice as to any future possibility of operating on the hand in order to improve the appearance of it.

Q As a result of that advice that you have gotten, what determination was made, if any — A Well, we have determined that at such time as we thought was appropriate, we would have an operation performed, but
350 that operation has not been performed.

Q What, if anything, any advice that has come to your attention as a result of the examinations, and so forth, of the hand, concerning the probability or likelihood that a plastic repair operation would improve the appearance or condition of the back of the hand? A All doctors have indicated there is no chance to eradicate the permanent injury. However, they have from the viewpoint of appearance, considering the fact that there is some question as to the effect that the operation may or may not be successful — if it is successful it may possibly improve the appearance of the hand by excising that scar.

Q You mean the appearance of the hand, the dorsum, the back of the hand, where that finger is now missing? A That is correct.

Q Have you discussed with your folks the keloid scar tissue? A We have.

Q What, if anything, was determined by you or them concerning the keloid scar tissue, as to whether a plastic repair operation would completely eradicate it?

Mr. Canfield: If the Court please, that would call for a lot of hearsay testimony. We have already got the doctor's testimony in the record.

351 The Court: I will ask the reporter to repeat the question.

[The reporter read the last question as above set forth.]

The Witness: We have received no —

Mr. Wood: Just a moment, until His Honor rules.

The Court: You are asking him what determination was made.

Mr. Wood: Merely asking him what decision was made as a result of the advice of the doctors, and so forth, on that subject matter.

Mr. Canfield: I do not object to that question.

The Court: All right.

By Mr. Wood:

Q What were you given as a result of the advice —

Mr. Canfield: Now, if the Court please, he is changing it —

The Court: I will ask the reporter to repeat the previous question.

[The reporter read the previous question as above set forth.]

The Court: Why don't that satisfy you?

By Mr. Wood:

Q Go right ahead. A Up to now, of course, as
352 I have indicated, we have not had an operation performed. It is our intention to have an operation performed with an idea of doing away with the keloid, if possible. However, as I have indicated —

Mr. Canfield: If the Court please, that answers the question.

The Court: Well, I guess he can qualify what his decision was, if his decision was qualified. Go ahead.

The Witness: However, as I have indicated, we have had advice that there is some kind of possible question that the keloid may or may not be eradicated entirely.

The Court: All right.

By Mr. Wood:

Q Is that one of the reasons you have not to date had a plastic repair operation? A That is right.

Q You do not, in your own mind, have any assurance —

Mr. Canfield: Now, if the Court please, that is obviously an improper question.

The Court: Haven't you developed all that you can develop from that, Mr. Wood—honestly?

Mr. Wood: Well, I thought I was entitled to a little more. If Your Honor does not think so, I will not press it.

The Court: I do not see what more the witness can say. I mean, he has stated all he can. He wants to
353 have it done, expects to have it done, was told it can be done, but there is some doubt about its being successful. That is the sum and substance, isn't it, Mr. Jacobsen?

The Witness: Yes.

By Mr. Wood:

Q I hand you a bill that appears to be a statement from the Children's Hospital, and ask you if that is the charge for your daughter Betty-Lynne's hospitalization as a result of this accident. A Yes, it is.

Q Will you tell us whether or not you at that time—I will withdraw that.

What was the total bill at the Children's Hospital, Mr. Jacobsen?

Mr. Canfield: If you will let me see it I will probably stipulate it with you.

Mr. Wood: There is an entry there, Mr. Canfield, about a group health, I want to bring that out.

Mr. Canfield: No objection.

By Mr. Wood:

Q The total expense while at the Children's Hospital for hospitalization was what? A Seventy-one seventy-five and it appears upon this bill, as I recall, what it was—

Q I mean, were you a member of Group Health
354 at that time? A I was.

Q What was the actual amount that you paid? A Forty-seven ninety, as I recall was the amount I paid personally, the rest was handled by Group Health Agency.

Q Forty-seven ninety and the rest was paid by Group Health, and you don't know just how much was paid by them? A Not off-hand, I don't.

Q Did you pay any other charges while your child was there at the Children's Hospital? A Not as far as the hospital itself went, no.

Q With reference to the operating room, I hand you

a bill which appears to be Dr. Furst's statement, was that in connection with the operation? A Yes, sir, connected with it. However, this was a separate bill rendered.

Mr. Canfield: That is the anesthesia.

The Witness: Anesthesia, that is right.

By Mr. Wood:

Q Was that administered by Dr. Furst? A So far as I know, I was not in the room, so I have no way of knowing.

Q That was paid, wasn't it, I mean that bill, in
355 connection with the operation? A The bill is paid, yes, sir.

Q State whether or not you at any time had your daughter examined by any other surgeon or plastic specialist, and if so who? A We took the daughter to Philadelphia to Dr. Davis up there who was supposed to be quite a renowned doctor, and he gave her an examination, and, of course, after we went out west, she was examined by her grandfather, I mean by the little child's father-in-law, my wife's father.

The Court: You don't mean the little child's father-in-law.

Mr. Wood: You mean your father-in-law.

The Court: Your father-in-law.

Mr. Canfield. Her grandfather.

The Witness: The child's grandfather, that is right.

By Mr. Wood:

Q Dr. Davis in Philadelphia, before you went up there, will you tell us whether or not the child was still under Dr. Coffey's care? A Yes, the child was still under Dr. Coffey's care.

Q Did you secure permission from Dr. Coffey to
356 take her to Dr. Davis in Philadelphia? A Yes, we did, we—he knew we were taking her up there.

Q Was a charge made for that examination? A Yes, there was.

Q Do you remember how much? A Fifteen dollars was the charge for the examination.

Q What did that have to do with the examination of Dr. Davis? A We had Dr. Davis examine her for the purpose of advising us as to the future possibility of hand improvement.

Q Looking toward a plastic repair operation, were you not? A Yes, that is right.

Q Was your daughter examined by any other physician not long after the accident? A She was examined by Dr. Creer, Dr. Roscoe Creer.

Q I hand you a statement and ask you if that is a charge made for that examination? A That is right.

Q That is three dollars? A That is correct.

357 Q That was paid by you? A I paid that.

Q I hand you a check, which is dated December 26, '45, and ask you to identify that, if you will, please? A I presume this is the check that my wife gave to Dr. Clifford White for the examination that he made during the baby's treatment, prior to the accident.

Q You indicated he was your daughter's—or your children's doctor before that, and you took her to Dr. White?

A That is correct.

Q What charge did he make? A Five dollars.

Q That was paid by your check, by the check you have in your hand? A That was paid by this check.

Q Did Dr. Coffey render a bill for any services that he performed? A As I recall, I had a bill of \$50 from Dr. Coffey, and I think the child was to him subsequently, if I recall correctly, I don't recall that we ever had a bill on that as yet.

Q What was that charge made for, services and treatment—was it for treatment in the Children's Hospital, or subsequent to that? A That was for treatment

358 after he had left the Navy, and we had placed the child in his care as a private physician.

Q Where did he maintain an office or practice medicine

after he left the Navy? A In the Medical Building, where his office presently is located, on Connecticut Avenue.

Q After leaving the Navy, did you continue to take your daughter to Dr. Coffey? A That is right.

Q And you were not sent a bill for the medical attention given while in the Children's Hospital? A That is right.

Q And the charge that was made was subsequent to his leaving the Navy. A The Naval Service, that is right.

Q You heard Dr. Coffey's testimony that he thought it was a hundred dollars; you testified that you did receive a bill at that time for fifty, and then there were other services rendered after that, is that correct? A That is right.

Q Have you paid Dr. Coffey his bill yet? A No, I have not paid the bill as yet.

Mr. Wood: I don't want to ask this question—I will come to the bench for a moment.

[Counsel for both sides approached the bench
359 and conferred with the Court as follows:]

Mr. Wood: I think I have the right to ask this witness whether he intends to pay Dr. Coffey for any other services, for instance while he was in the Navy—I don't want to ask that because Your Honor ruled the other day that unless he sent a bill, why, it was not admissible, so I don't want to ask the question, but I think I have a right to show—

Mr. Canfield: I will object to it.

The Court: Mr. Wood, my understanding is that he has got the right to recover any medical expenses that are fair and reasonable, not exceeding the amount that he either paid or is obligated to pay. Now I may be wrong about that, but that is what my understanding of the law is.

Mr. Wood: You are right, I have a decision on that. It says that a bill not yet paid—I have even one decision—

The Court: Of course, when a bill has not been paid.

Mr. Wood: Where a child sued, and they said the parent was not entitled to recovery for it. They said the child could even put it in—

The Court: Surely, if it is an obligation.

Mr. Wood: My theory is this, this man feels
360 very obligated to Dr. Coffey to pay him his full bill for everything he did at the Children's Hospital.

The doctor did not send him a statement while he was in the Navy. If a man has an obligation, and he feels that he owes somebody and that he feels he wants to pay it, I don't see why he should be blocked in recovering any damage by the guilty person who brought the damage about. Dr. Coffey said he made no charge for it because he was still in the Service, because Mr. Jacobsen was a brother Naval officer, but that does not say that this man may not feel an obligation to pay it.

The Court: I understand. It is not a question whether he feels an obligation to pay it or not, it is a question whether it is a legal obligation.

Mr. Wood: I think if that is the way he looks at it, that it would.

The Court: If a man renders services with no intention of charging for them, can that create an obligation?

Mr. Wood: The doctor said that while he was in the Navy he was permitted to have private practice.

The Court: Yes, but he said definitely he did not intend to charge him. Can you convert something that is not an obligation into one which can be a moral obligation?

Mr. Wood: I thought the doctor said he did not send one. It is not a question he would not expect to be
361 paid for it, but he would not send one out. I won't press it.

The Court: I do not think you would be right if you did.

Mr. Wood: Very well.

The Court: Is that all you are going to ask?

Mr. Wood: I have about two more questions that I want to ask.

The Court: All right.

[At the conclusion of the foregoing conference counsel returned to the trial table and the trial proceeded as follows:]

Mr. Wood: Will Your Honor indulge me just for a moment please—I think that is all.

The Court: We will take a five-minute recess.

[Whereupon a brief informal recess was taken.]

Mr. Wood: I would like to have the Clerk mark these as Plaintiffs' Exhibits 8 to whatever the proper number should be.

The Court: 8 to what?

The Clerk: 8 to 12, five exhibits, 8 to 12.

Mr. Wood: Plaintiffs' Exhibits 8 to 12, inclusive, for identification.

You may take the witness.

[Plaintiffs' Exhibits Nos. 8 to 12, inclusive, were marked for identification.]

362

Cross-Examination

* * * *

By Mr. Canfield:

363 Q Now, when you saw Dr. Davis in Philadelphia you went up there for the purpose of having him determine whether an operation was suggested, did you not? A That is right.

Q Dr. Davis is a well-known pediatrician in Philadelphia, isn't he? A He is also a surgeon.

364 Q Pediatric surgeon? A That is right.

Q You had been given his name by Dr.—either by Dr. White or some other doctor as being a competent man? A I had been given his name by my brother-in-law, Dr. Lloyd Carroll, who was then attending Jefferson Medical College.

Q In Philadelphia? A That is right.

Q You did see Dr. Davis? A We did see Dr. Davis.

Q Dr. Davis recommended you having the child go through surgery, did he not? A Not at that time.

Q Well, at some future time? A At some future time.

Q You discussed with him what the possible charge would be including hospitalization, did you not? A We had some discussion on that.

Q That was three hundred to four hundred dollars, was it not? A Three or four, I think there was a statement made on that.

365 Q No more than four? A No more than four, that is right.

Q That would include any surgical fee and all the hospitalization? A As I recall, just the surgical fee.

Q Now, had you contemplated having Mrs. Jacobsen's father do the job? A We have thought of that, yes.

Q He is a well-known surgeon out in Utah, is he? A He is.

Q And competent and capable of doing this job, is he not? A He is competent of doing this job.

Q In all likelihood that is where you are going to have it done, isn't it? A We have not as yet made up our minds, it will either be him or Dr. Coffey.

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366 Mr. Wood: If the Court please, at this point I have a motion to make in behalf of the plaintiffs' case to be included as a part of the plaintiffs' case, so that perhaps we had better come to the bench and make.

The Court: All right, do that.

[Counsel for both sides approached the bench and conferred with the Court as follows:]

Mr. Wood: If the Court please, I now, in behalf
367 of the plaintiff, make a motion that the jurors be given an opportunity to view the premises to see the two different types of escalators in operation, and also

not in operation, as part of the plaintiffs' case, as it will give further information to the jury and assist them to arrive at a proper verdict in the case. Whatever time Your Honor would fix at the end of this case or at any time it might be appropriate for the purpose to indicate.

The Court: I thought you had done pretty well in pictorially representing the situation to them, haven't you?

* * *

382 Mr. Canfield: I always bow to Your Honor's ruling, but let's not lose sight of the fact that we are not here concerned with the attractive nuisance theory, that is ruled out.

The Court: We are not at least going on any attractive nuisance theory. The child did not go on there because it was attracted by it. The child got on there because its mother took it. The attractive nuisance comes from the point where a lot of things, such as childish curiosity, and interest in things that click, and move about and we would get into the turntable cases and various things

383 like that, maybe an escalator, but not here. The child was carried on the escalator, and got there and fell. Now, if it has gotten away from its mother and fell, or it has gotten on its feet after falling, for that matter, and had run over there by itself and stuck its hand in the thing to see what would happen, there might—there you might have any attractive nuisance proposition.

I do not think your request is particularly well supported by the authority that you have cited to support it, but in the exercise of the discretion which I think lies in the trial court, I am somewhat disposed to think that there might be some value in looking at the thing. We are not going to do it today. I am going to quit.

Is that your case after they view the premises?

Mr. Wood: Yes, that is the last.

The Court: That request will be granted and then we will proceed with the defendant's case.

* * *

388 Mr. Canfield: I understand the plaintiff now, subject to the motion which Your Honor granted yesterday, rests.

The Court: That is right, that is my understanding.

Mr. Canfield: Then I want to note my objection in the record to the view of the jury for two reasons. First, I do not see how the jury can get the thing unless the whole tragedy is reenacted, and second, and most important of all, it would be inconsistent with my position that the purpose of the view would unquestionably be to have the jury see the difference between the two models of escalators. I am quite confident that is the purpose of the view.

The Court: I think it is too.

389 Mr. Canfield: I say that is immaterial in this case. It is not an act of negligence, and therefore I want to note for the record my objection to the Court's exercise of this discretion.

The Court: I think you are correct in your statement that that is inconsistent with your position.

Mr. Canfield: I just wanted to make my point.

The Court: Yes.

* * *

394 The Court: Yes. I believe I will hold that the doctrine of *res ipsa loquitur* is not applicable here in the posture of the case it is in, and I think, that only goes to one thing, unless I undertake to take it away from the jury, which the application of the doctrine would prevent. It is simply whether I have got to charge the jury on an inference of negligence or not. I think they should be instructed that they must determine

395 from the evidence in this case, as a matter of fact, whether or not the construction here involved was negligent, and whether or not the owner of the escalator exercised all the reasonable foresight and skill to prevent injury to passengers.

Mr. Wood: Very well.

The Court: So far as your motion is concerned, it is granted.

Now the effect of it, as I see it, is only with respect to the instructions to the jury.

Mr. Canfield: All right. Now, to be consistent, I move to strike the plaintiffs' testimony which has to do with the installation of the new model in 1941. I shall not argue that.

The Court: No, I think that has been argued. I will deny the motion for the reason stated at the time I admitted the evidence on that.

Mr. Canfield: Yes, Your Honor.

Now, I move to dismiss that part of the claim so far as the adult plaintiff acting in loco parentis is concerned, on the ground that as a matter of law the mother acted in loco parentis at the time of the accident and is guilty of contributory negligence. If Your Honor wants me to argue that—

The Court: I do not think I do, Mr. Canfield, because it will complicate it. I have to consider that, and it is my view—I thought I had expressed it at the time, I am not ruling on the charge of negligence on that point, but I think the question of such negligence is a matter of fact rather than a question of law so I think that matter should go to the jury to determine whether or not there was negligence by the mother, and if so, then I would think they should be instructed to find for the defendant with respect to the father's claim for special damages.

Mr. Canfield: Your Honor denies the motion?

The Court: Yes.

Mr. Canfield: I now move to dismiss the whole claim on the ground that the plaintiffs' case is bottomed on the doctrine of attractive nuisance which the Court ruled out at the beginning of the case, and on the second ground that the only acts of negligence indicated that I can see at this point are having to do with the construction of the

old model, and superseding the thing by the new model. I have argued to the Court that that is not an act of negligence, and therefore the jury should not be permitted to consider it.

On the third ground, and the most important ground of all, that the cause of this regrettable and unfortunate accident was not any fault, or any negligence, or any breach of duty on the part of the defendant, but was solely
 397 and exclusively the fault of the one acting in loco parentis at the time of the accident. In other words, the proximate cause, which is one of the factors upon which negligence turns, so that you not only have negligence, you have proximate cause, and you have breach.

The Court: Undoubtedly so.

Mr. Canfield: The evidence in this case undoubtedly shows as I have argued to Your Honor, that the fault, the cause of the accident was not on the part of the defendant, either in the maintenance, construction or operation of the escalator, but the fault was that of the mother solely and exclusively, and her negligence toward one committed to her care at the time she was in the store, and by her failure to observe her positive duty here, namely, to properly look after the interest of one so young that she could not comprehend the nature of the apparatus and that this whole thing was caused proximately by the negligence and fault of one acting in loco parentis. Therefore, there is no negligence to go to the jury.

The Court: Well, on the question of attractive nuisance, frankly, I do not see where that comes into play here at all. As I understand it, that doctrine, which is the doctrine that makes it obligatory on one who is operating a mechanism or situation or condition that is likely to interest children of 'tender age to guard against
 398 its use. I do not think that comes into play here at all. It might, I would say, if the child had been off the escalator and had been attracted by the escalator

and had been attracted by curiosity or something or other and had gone upon it or gone to it and had been injured by so doing. I don't think that is the picture here at all. I do not think that the defendant is liable on any basis of attractive nuisance.

I am not clear as to the second ground as distinguished from the proximate cause and you made a third ground, what was that?

Mr. Canfield: The second ground, I said there was no failure or breach of duty on our part in construction.

The Court: Yes, that I think I have already passed on. I have ruled on that that there was such a failure, but whether or not there was a failure is a question of fact for the jury.

Thirdly, I think the question of proximate cause is also one, in the circumstances, for the jury. It might be said that the taking of a little girl on the escalator itself was the causal thing that caused the injury. Secondly letting a child get away from her mother might have had something to do, or probably it would have been prevented if the child had not gotten away.

By the same token, if the child had not caught its
399 hand in the escalator, it would not have been hurt.

Now, the defendant is not liable simply because the child caught its hand in the escalator alone. It must be shown that there was negligence on the part of the defendant that brought that about.

I think on appropriate charge the jury must pass upon what was the proximate cause, and if there was negligence on the part of the parent, was that the proximate cause. If it was, why, that is that.

I think the motions will be denied, for the reasons stated.

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Edgar R. Ray

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Direct Examination

By Mr. Canfield:

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Edgar R. Ray

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Direct Examination

By Mr. Canfield:

or they can get out of alignment, or they can be worn to a point where they would be hazardous.

Q Now, you are required under the law to make these inspections of escalators? A Yes, sir.

Q How often does the law of the District of Columbia compel you to make them? A Every four months.

407 Q And that is in this area? A Yes.

Q When you make inspections, do you make a written report? A Make a report.

Q To whom are your reports made? A Our reports are made to Mr. Davis.

Mr. Wood: I don't like to interrupt, but I think at this point we are entitled to the law as to how it is regulated.

By Mr. Canfield:

Q Have you got the rules and regulations? A Yes, sir.

Q May I have them? A Page 10 is our regulation.

Mr. Canfield [showing same to Mr. Wood.]

By Mr. Canfield:

Q Now, if you discover a hazardous condition, what do you do? A We notify the owner or the one that is responsible for that equipment to have it fixed.

Q Do they sometimes when you compel them to, shut them down, if they are hazardous, until repairs are made?

A If the hazard looks important we shut them down, but if it looks as if it might be safe for ten or twenty
408 days, why, we grant them that much time to make the repairs.

Q Now, are you familiar with the down escalator from the third to the second floor in the Hecht Department Store? A Yes, sir.

Q Have you examined that as part of your official duty? A Yes, sir.

Q Over the period of years have you examined it? A Since it was installed, I believe it was in 1934.

Q Do you recall when it was installed? A I recall when it was installed, yes.

Q Would you be required to inspect it before it was per-

mitted to start operation? A Oh, yes, sir.

Q Did you make such inspection? A Yes, sir.

Q Now after having made that inspection, did you give it your official approval? A Yes, sir.

* * * *

409 By Mr. Canfield:

Q When the elevator was being installed you said you examined it before it was started then? A Yes, sir.

Q And you examined the treads and the comb
410 plate, and the openings? A Yes, sir.

Q And the manner in which it functioned? A Yes, sir.

Q Did you give that your approval before you permitted it to operate that escalator? A Yes, sir.

Q If that had not met the safety requirements of the District, would you have given your approval? A No, sir.

* * * *

Q The rule says that you shall examine all moving
411 apparatus, does it not? A Yes.

Q Page 133 covers escalators? A Yes, sir.

* * * *

By Mr. Canfield:

Q Mr. Ray, these regulations which you have just handed us are the official regulations still the elevator regulations of the District of Columbia, elevators, escalators and dumb waiters, effective July 1, 1939—is
412 that the last printed copy? A That is the last copy.

* * * *

Q Now I neglected to ask you the question before we adjourned. This escalator, when it was installed in 1934, do you know who installed it in the Hecht Company store? A The Otis Elevator Company.

Q Do you know whether or not that was the standard type manufactured by them at that time? A Yes, sir.

Q Meaning in 1934.

You said you examined the treads and they had to be horizontal to comply with the regulations, did they not?

A Yes, sir.

Q You examined the treads, the openings, the apertures and the other parts of the apparatus? A Yes, sir.

Q And finally they met with your approval.

Mr. Wood: I—

By Mr. Canfield:

Mr. Canfield: Wait until I finish my question.

Q Did you permit the escalator to go into service?

413 Mr. Wood: Now I object, first on the ground that it is decidedly leading and the witness had not yet said he examined the openings.

The Court: Well, don't lead the witness, Mr. Canfield.

I will permit the question to be answered as to what he did, and as to whether or not that suffices, why, I think that is a matter for cross-examination.

By Mr. Canfield:

Q Let me reframe the question.

You said you examined the treads? A Yes, sir.

Q And the steps, the corrugations and the openings or apertures? A Yes, sir.

Q And the other parts of the machinery?

Mr. Wood: I object. I do not recall him having said he examined any openings at all.

Mr. Canfield: So that there cannot be any question about it, I will ask him the question.

By Mr. Canfield:

Q Did you examine the apertures or openings between the steps? A Yes, sir.

Q Now after having made that examination covering all these things which I have indicated, and any
414 other parts which you examined, tell us, what, if anything, you did with reference to permitting those escalators to go into operation in the Hecht Company store, back in 1944? A Well, we tested all the safety appliances, the stop button, and the safety, that would pre-

vent the elevator from running back down again in case it was overloaded and any part that would be—that could create a hazard, overheating or something of that sort—

The Court: The question was, after you did all that, what did you do?

The Witness: Then I reported to the Inspector of Business and he ordered a certificate of approval sent out.

Q And thereafter the escalators went into service? A Into service, yes, sir.

Q Now, in 1945, did you make your customary four months inspection? A Yes, sir.

Q Did you inspect this particular escalator, meaning the down escalator from the third to the second floor in 1945? A Yes, sir.

Q With reference to November 15, 1945, will you look through your report—those are your official reports? A Yes, sir.

415 Q They are maintained in the District Building? A Yes, sir.

Q Will you examine the report nearest to the date of November 15, 1945. A The nearest is October 26, 1945.

Q Did you make an examination that day? A Yes, sir, I made an inspection on that day.

Q What did you inspect, just tell what you did. A I examined all the moving parts, the parts that are subject to wear or corrosion or rust. Those parts are examined every four months.

Q Would that examination bring to your attention the apertures or the openings between the steps? A Insofar as any teeth had been broken, or something of that sort.

Q Did the examination take in the apertures? A Yes, we looked at them.

Q Did you examine the other moving parts? A Yes, sir, any moving parts.

Q By the way, did the escalators—the hand rail of the escalators, was that a moving hand rail? A Yes, sir.

Q Did your examination cover that? A Yes, it covers

all that.

Q After you made the examination on October
416 26, 1945, what was your report to your officials? A
Everything O.K. was the way he put it.

Q You mean everything satisfactory? A Satisfactory.

Q Now, did that cover the safety features as well as
the moving parts? A Yes, sir, that covers—

Mr. Wood: I object to Mr. Canfield leading the witness.

The Court: Do not lead the witness.

By Mr. Canfield:

Q What did your examination consist of on this particular day? A My examination, the way I understand your question would be, I looked for anything that might become hazard, for instance, the treads, to see if the treads were worn off—if they are worn, and in my opinion they might become hazardous, before I would get back in say four months, and I looked for loose teeth in the gears that might possibly work out; I looked for parts in the motor that might wear, because the motor—and cause the motor to burn up, and I looked to see for pieces that might be broken out of the tread or out of the comb plate.

Q Now, when you examined these treads, would you look at the apertures or openings to see what shape
417 or condition they were in? A Oh, yes, because sometimes they do get thin and break out.

Q You examined the space between them?

Mr. Wood: I move to strike, this is still decidedly leading, Mr. Canfield, I think you ought to let the witness say what he examined.

The Court: Well, it is pretty difficult, I think, to interrogate a witness about a thing like this without asking him what he did examine.

Suppose the witness tells us, without being led what happened—go ahead.

By Mr. Canfield:

Q The question was did you particularly look at the openings?

The Court: Did you examine them?

The Witness: Yes, sir, I examine them every time we go there.

By Mr. Canfield:

Q Now, when you made this examination did you find anything which in your opinion as an official constituted a hazard to the use of the escalator? A No, sir.

Q And you so reported? A I so reported.
418 Q Did you come again after this accident—has the accident been reported to you in any wise?

A No, sir, I didn't know anything about it.

Q So that your examinations were all on an official visit? A Yes, sir.

Q The regulations provide for a safety release, do they not? A Yes, sir.

Q And was that safety switch installed, a thumb switch? A Oh, yes, that is there.

Q That is in compliance with the regulations? A In compliance with the regulations, it is a most—

Q Now, in 1945, when you made your examination in October did you find anything at all, which in your opinion violated any regulation? A No, sir.

Q Did you find anything at all which in your opinion constituted a hazard to the use of the escalator. A No, sir.

Mr. Canfield: Take the witness.

Cross-Examination

By Mr. Wood:

419 Q You did not measure the space between the steps and the comb plate, did you, Mr. Ray? A No, we didn't measure that.

Q You don't even know the distance between them, do

you? A No.

Q You have been in that store on many occasions making an inspection, and your inspections therefore have nothing to do whatsoever with the width of the space between the steps of this type of the down escalator from the third to the second floor, the space between the top of the treads or the corrugations as they meet the comb plate, and made no notation as to the distance there in your report at all, did you? A No, because our regulation does not give any distance.

Q Exactly, your regulation has nothing to do with it, is that right? A That is right.

Q So all this testimony you have given is with respect to other things relating to this escalator, is that so? A Other things, sometimes it is possible for one of those teeth to get broken out.

Q Exactly so, but only when a tooth is broken do you make any mention in your report, which you said on
420 this occasion of October 26, 1945, you put "O. K."

A Yes, sir.

Q Is that right? A That is right.

Q You have been in there many times, of course? A Yes.

Q You have noticed, have you not, that all the elevators from the third to the seventh floor are a more new and modern type? A Yes, sir.

Q You have also noticed, haven't you, that the escalator from the main floor to the basement is the same type, the new type, from the third to the seventh floor? A Yes, sir.

Q You know, do you not, that they only have the two floors with this old type, the one installed in 1934, namely, from the first to the second and the second to the third, up, and the down escalators, is that right? A That is right.

Q You have had an opportunity to observe the two of them in making your inspections, have you not? A Yes.

Q And the space between the treads or corrugations or the steps in the newer type that was installed in 1941 is much less as the steps meet the comb plate than
421 the space between the older type as the steps meet the comb plate, isn't that so? A That is so, that is right.

Q It is much easier for an object to get caught in the old type in that space than it is in the new, is that right?

A Yes.

Q You say this accident was not reported to you on November 15, 1945? A No, sir, I have no report of that at all.

Q Aren't they supposed to report accidents to escalators to you? A They are.

Q And this was not reported? A No, sir.

Q Do you have with you a report to you in the fall of 1938?

Mr. Canfield: I object to that, if the Court please.

By Mr. Wood:

Q On the first floor down escalator, same location? A I have not even got that in my record, I don't go back any further than '42, they are kept in the vault—I cannot recall '38.

Q Well, you were then on that route or beat or whatever you may term it, that was your territory, was it
422 not, Mr. Ray? A Yes, sir, but I don't recall that I received any report at that time.

Q You have no recollection at all that any accident was reported by you or to you as inspector for the District of Columbia, where a child's hand got caught between the steps as they started under the comb plate on either floor, the first or the second, do you? A No, sir.

Mr. Wood: That is all.

Redirect Examination

By Mr. Canfield:

Q Isn't it a fact, Inspector, that the only time accidents are reported to the Building Inspector's office is when some damage has occurred to the machinery for which repairs have to be made and a reinspection is necessary before they go into operation? A Well, it only says in case of accidents, it does not say what kind of accidents.

Q That has been construed by your department to be only such accidents where machinery has been damaged?

Mr. Wood: I object.

Mr. Canfield: Wait until I finish my question—don't answer this until Mr. Wood has a chance to object.

By Mr. Canfield:

423 Q Isn't it a fact that the Bureau — your department has construed that to mean that only accidents need be reported where machinery has been damaged and new parts put in and another inspection has to be made before you permit the current to be turned on?

Mr. Wood: I object, if the Court please. The witness has just stated that the regulations say that they shall report accidents. Now he is not the head of this department, and I say that in view of his answer, it would be objectionable for this question to be permitted to be answered.

The Court: Well, I don't quite agree with you, but I think it is a well-recognized rule that administrative interpretation of a regulation are admissible. Now if he is familiar with it — he may not be, there may not be such an administrative interpretation, but it is admissible if there be one.

Do you know whether or not there has been an administrative interpretation of that provision which requires the report of accidents to be made?

The Witness: We have never taken any action against any company that did not report an accident.

The Court: I am not talking about that. I am talking about the question that Mr. Canfield asked you. Has there ever been, to your knowledge, an administrative interpretation as to what kind of accidents were meant?

424 The Witness: No, sir, there has never been any interpretation to my knowledge of what kind of an accident —

The Court: That answers the question.

By Mr. Canfield:

Q Mr. Wood said to you that when you made your examination as to the width of the treads you stated the regulations did not provide for any definite width or separation of the treads. A That is right.

Q In spite of the fact that the regulations do not contain such a provision, if there was anything of a dangerous or hazardous nature to you as you made your general inspection, would you have permitted the operation of this escalator after that was brought to your attention?

Mr. Wood: I object.

The Court: I am inclined to agree with the objection there, Mr. Canfield. The question right now that the inquiry is directed to, I think, would go to whether or not independent of any silence on the part of the regulation as to the width of the — what do you call them?

Mr. Canfield: The treads.

The Court: The treads, he would undertake to report what he considered to be an extensive width of the aperture.

Mr. Canfield: Or any other dangerous condition.

The Court: Well, we are talking now about that
425 particular thing.

Mr. Canfield: Yes.

The Court: I think I will permit the question to be put to him, ask him whether or not, although the regulation was silent on it, he would report any particular width.

Mr. Canfield: Suppose I reframe this question — don't answer this until counsel objects and the Court rules.

By Mr. Canfield:

Q Take these 1934 escalators which are under discussion here, in spite of the fact that the regulation does not set down definite dimensions of those treads, if, as you saw them during your inspection, they constituted a hazard

would you have passed them?

Mr. Wood: I object.

The Court: I think I will permit that, Mr. Wood. I believe that narrows it down to the point that is under inquiry — do you understand the question, Mr. Ray?

The Witness: The way I understand the question is that even if the Code or our regulation does not say anything about that distance it would be up to me, if I thought it was a hazard.

The Court: The question is as you say.

The Witness: I do not think that I have authority to make the company do anything that the District
426 Commissioners have accepted.

The Court: Then your answer is that you would not deal with that?

The Witness: No, sir, there is a different condition there.

Mr. Canfield: All right, that is all.

Recross-Examination

By Mr. Wood:

Q If you had definite knowledge that this aperture of the 1934 installation in the Hecht Company would catch a child's hand and cut the finger off you certainly would consider that hazardous, would you not, Mr. Ray? A Well, yes, I would consider it a hazard, but I certainly could not do anything about it after we once accept it.

Mr. Wood: That is all.

Further Redirect Examination

By Mr. Canfield:

Q The same thing, if an adult caught his hand in it, it would be hazardous, would it not? A Yes, sir.

Mr. Wood: I object, if the Court please.

The Court: What is the objection?

Mr. Wood: There is no evidence in the case that an

adult caught his hand.

427 The Court: I don't see any harm — go ahead.

Mr. Canfield: I have finished.

The Court: That is all?

* * * *

Eldeldis Kracke

* * * *

Direct Examination

By Mr. Canfield:

Q Your name is Elsa Kracke, is that correct? A Eldeldis Kracke.

Q Where are you employed, Miss Kracke? A The Hecht Company.

* * * *

Q In what capacity? A Floor manager, second floor.

428 Q How long have you been so employed? A Five years as floor manager, seven years in the store.

Q Seven years all told? A Yes.

Q Were you employed as floor manager on the second floor in November of 1945? A Yes, I was.

Q Directing your attention to about 10:30 or 11:00 o'clock of that — in the morning of that day, did anything come to your attention with reference to the escalators? A What time, sir?

Q Sometime during the morning? A Yes.

Q Now, would you tell the Court and jury in your own way just what happened, what you saw, and what, if anything, you did. A Well, the only thing I saw, I heard a scream, and in a flash I ran across and stopped the escalator.

Q How far from the escalator were you? A I was about ten feet.

Q When you heard the scream what did you do with

reference to where you were standing? A I ran to the escalator at once.

Q With reference to the people there, can you
429 state whether or not there were people there? A
There were.

Q At the foot of the escalator? A There was not too many, but a few.

Q Did you have any trouble reaching the escalator? A None whatsoever.

Q When you got to the escalator what, if anything, did you do? A I stopped the escalator at once.

Q Had you seen the child there in trouble? A I knew by the screaming; I did not see the child.

Q You did not see the child? A No.

Q But you did stop the escalator? A I stopped the escalator.

Q Then what happened, if anything, if you recall? A That is the only thing that I recall.

Q Well, did somebody take the child? A Yes, somebody took the child.

Q Do you remember who that was? A I am sorry, I don't.

Q Did you examine the child at all? A No, sir.

Q Did you examine the escalator to see where
430 the child was caught? A No, sir.

Q You just cut it off? A I cut the escalator off.

Q How long would you say it took you from the time you first heard the screaming until you got to the escalator?

A Less than twenty to thirty seconds.

* * * *

Cross-Examination

By Mr. Wood:

Q The escalator would move quite a distance in thirty seconds, would it not? A I could not say.

Q Doesn't it go about ninety feet per minute? A I

beg your pardon?

Q Doesn't it travel about ninety feet per minute? A I am sorry, I could not say how fast the escalator travels.

Q In thirty seconds quite a number of steps would disappear under the comb plate into the floor, isn't that so?

A I don't think too many.

Q Where is the stop button located, Miss Kracke?

431 A Right at the bottom of the escalator.

Q And you have to lift a plate up in order to get at the button, in this type, the one from the third to the second floor, do you not? A That is correct.

Q And you remember — did you have to get down on your knees to get it out? A I didn't have time for that, I am sorry, I just fell down.

Q Fell down? A I didn't fall, I pulled it down.

Q But you do have to get down to turn it off, don't you?

A You have to reach down, yes, sir.

Q And when you first went to work for Hecht — you say you have worked there seven years, you are working there now, are you not? A Yes, I am.

Q Before you were acquainted with where the stop button was you were told by someone when you were floor manager where the stop button was, were you not? A We were instructed.

* * *

432 By Mr. Wood:

Q Isn't it a fact, Miss Kracke, that the stop button underneath this plate that has to be lifted is right at the base of the 1934 installation; by that I mean the one that was being used from the third to the second floor? A It is about that far [indicating] from the base.

Q It is about that far from the base? A Yes.

Q I thought you indicated — A Right at the bottom, the base.

Q About four or five inches? A I could not say how many inches.

Q You would have to get down on your knees or stoop way down in order to find it and turn it off, would you not?

A You know exactly where it is, you don't have to look for it, just reach down and stop it at once.

The Court: The question is whether you would have to reach down for it. How close was it to the floor, if
433 you can tell us?

The Witness: Well, I could not say — I have never thought about how many inches it was.

By Mr. Wood:

Q Approximately? A Maybe three or four inches from the floor.

Q If you didn't know where it was it would be rather hard to find it, would it not? A Well, everybody is instructed where to find the stop button.

Q I am not asking you a question about everybody, I am asking you if you did not know where it was it would have been hard to find, would it not? A Yes, I guess so, if anybody didn't know.

Q Did you say you were floor manager of the first floor, Miss Kracke? A No, sir, on the second.

Q On the second floor, and you were ten feet away — would you please point out in the courtroom some object that you estimate ten feet to be? A Well, I would say as close as the second chair over here [indicating].

Q This chair here [indicating]? A Yes, this seat.

434 Q Here [indicating]? A Yes.

Q From where you are to there? A From here, if I was standing here [indicating].

Q And you were not facing the escalator, were you? A Yes, I was facing the escalator.

Q And yet, you did not see the child at all? A I ran over to stop the escalator.

Q I thought you said on direct examination that you did not see the child, you simply heard the screaming, is that right? A I heard the screaming, that is right.

Q Even though you were facing it, that you did not see

the child? A No, I didn't.

Q Well, if you were facing it when you heard the screaming and you were running for that stop button, the stop button being at the base, where was the child then? A I am sorry, my mind was on the button; I could not say where the child was.

Q You did not see the child when you went for the push button?

The Court: She said she didn't.

The Witness: I didn't see the child.

By Mr. Wood:

435 Q Anything to obstruct your view? A My intent was to stop the escalator.

Q Isn't it a fact that the child was sitting down facing into the escalator, the moving part? A I could not answer that, I don't know.

Q You don't know, but there was nothing to obstruct your view from seeing it, if the child was there, was there, at that time? A As I said, I was interested when I heard the screaming, I was interested in stopping the escalator.

Q About what time was it when you heard the screaming, Miss Kracke? A I don't recall the time.

Mr. Canfield: Do you mean the time of the day?

By Mr. Wood:

Q That is right, the time of the day. A I don't recall the time.

Q Did you see Mr. Bray there the chief engineer of the Hecht Company? A I don't recall.

Q You don't recall seeing him at all? A No.

Q Well, would say he was or was not there? A I would not say.

Q Did you see Mr. Jack Katz there who is your
436 supervising officer, isn't he; he is superintendent of floor managers, isn't he? A Yes.

Q And you know him very well, don't you? A I know him very well.

Q Did you see him there? A I don't recall.

Q You don't recall whether you saw him there or not?

A No.

Q Did you make a report to Mr. Katz after that as to what you did that day? A Yes, sir.

Q And you gave that to whom, Mr. Katz? A I gave what to Mr. Katz?

Q A report? A Yes, I always give those to Mr. Katz.

Q You know Mr. Bray very well, too, don't you? A Yes, I do.

Q Did you know Mr. Lewis, who at that time on November 15, 1945, was, I think, a guard or police officer in the Hecht Company? A Yes, I knew Mr. Lewis.

Q Did you see him there? A Yes, Mr. Lewis I remember.

437 Q Now, when did you see Mr. Lewis there, before or after you pressed the stop button? A It was after.

Q How long after you pressed it, did you see him? A Why, I could not say, maybe a few seconds, something like that.

Q A few seconds? A I don't recall the time.

Q The screaming you heard was coming from the child? A The mother.

Q The mother, you didn't hear the child scream? A I didn't.

Q What was the mother screaming, what did she say, did she say anything when she screamed? A She screamed.

Q Didn't she say, "Help, my child's hand is caught." A I don't remember that. I heard the screaming, and as I said, it was all one scream, and I ran down and stopped the escalator.

Q Didn't you hear three other screams after that before you stopped it? A No, sir.

Q Did you see the mother at all out on the floor as you

went by? A No, sir.

438 Q You didn't? A I didn't.

Q Nothing to obstruct your view from seeing quite a ways up the down escalator at the bottom, was there, Miss Kracke? A Not a thing, but as I said, I had my eyes on the —

Q The only thing you knew is where the stop button was, is that right? A That is right, I was interested in stopping the escalator.

Q And aren't you, as floor manager, also instructed to observe and make a report of anything like that that happens, an accident on the escalator, aside from stopping it?

A We make reports, yes.

Q And yet you cannot tell us anything about it except you put your finger on the bottom — on the stop button, raised the plate and stopped it? A That is right.

Q How long did Mr. Lewis stay there? A I am sorry, I don't know.

Q Can you give us some idea? A No, sir.

Q Did you get there first or did Mr. Lewis get
439 there first? A I cannot remember.

Q Did you leave first or did he leave first? A I don't know.

Q What happened to the child after you stopped the escalator? A The child was carried to the hospital room.

Q I mean, from the immediate bottom or base of the third floor down escalator, what happened to the child? A She was carried to the hospital room.

Q Do you mean the child was carried direct to the hospital?

The Court: She said "hospital room."

Mr. Wood: Oh, I beg your pardon.

By Mr. Wood:

Q You meant the first aid place, didn't you? A Yes, the hospital room.

Q Who carried her there? A I am sorry, I don't recall.

Q Where did you go after the child was carried to the first aid room? A The first thing I remember was —

Q I asked you where you went. A I don't recall.

Q You stayed right there at the bottom of the
440 escalator? A No, I didn't.

Q Where did you go? A I don't recall just where I went.

Q Did you stay on the second floor? A I was on the second floor.

Q How many people accumulated after you heard the screaming? A I am sorry, I don't recall the number.

Q How long — how many was there, was it one or twelve, don't you know? A No, I have not stated any amount.

Q Of course, you don't know how many people were on the escalator then, do you? A No, sir.

Q You are positive you only heard one scream? A I heard one scream, and then I rushed to the escalator.

Q Were there any screams after you rushed to the escalator? A I don't recall any screams after that.

Q You would not say there were not any? A I said I didn't recall screams after that first scream.

Q Well, then the answer is there were not any, or you just don't recall?

441 The Court: She said she didn't recall, Mr. Wood.
By Mr. Wood:

Q What time did you report for duty that morning, Miss Kracke? A 9:00 o'clock.

Q And did you go immediately to the floor on which you were floor lady? A Yes, sir.

Q Had you been on that floor all the morning? A Yes, sir.

Q What placed you within ten feet of this escalator at that time? A I beg your pardon?

Q What caused you to be ten feet from that escalator at the time you heard the scream? A I was interviewing one of my buyers.

Q Where was he and where were you? A We were standing about ten feet from the escalator in her department.

Q What direction from the bottom of the escalator? A We were facing the escalator.

Q The escalator comes down on the north side of the building, doesn't it, in the main building? A The escalator comes from the third to the second —

Q It comes down to the north, the way I am pointing now? A That is the direction — what is the direction you are referring to?

Q The down escalator, with reference to the base of it — I will show you the bottom of it in that picture or photograph, which is Plaintiffs' Exhibit No. 3, that shows the down escalator from the second to the third floor and you see the bannister here. A Yes.

Q Or the hand rail. A Yes.

Q And the floor and the steps. With reference to that location immediately in front of the open space, please indicate to us where you were standing talking to the buyer. A I was standing in front of the escalator right back of the escalator, say here, we were standing in front of it just as you are standing before me.

Q I see, immediately out in front of the escalator, kind of on one side. A Yes.

Q Who is this buyer, what is her name? A Her name is Mrs. Helen Scofield.

The Court: Was she a lady?

By Mr. Wood:

443 Helen Scofield? A That is right.

Q She was a buyer in some department on your floor? A She was and she is, yes, sir.

Q You didn't go up to the first aid room with the child? A No, sir, I didn't go with the child.

Q You went to work, I assume — you said five years, this is '48, you first went to work for Hecht's in '43, is that right? A I have been there seven years; I have been on

the second floor for five years, sir.

Q Would you tell us — that would be '41, then, is that right? A That is right.

Q And what month of the year, if you remember? A When I went in, sir? — April.

Q In April of '41? A Yes.

Q Shortly after you went there in April of '41, as a matter of fact, approximately September of '41, they installed newer escalators from the third floor to the seventh floor, didn't they? A I am sorry, I don't recall.

Q They were installed since you have been there, 444 were they not? A I don't recall nothing about the escalators.

Q You have travelled on the escalators from the third to the seventh floor, haven't you? A Yes, sir, I have.

* * * *

446

Howard P. Lewis

* * * *

Direct Examination

By Mr. Canfield:

Q State your full name, Mr. Lewis. A Howard P. Lewis.

* * * *

Q How are you employed, Mr. Lewis? A At the Hecht Company.

Q The Hecht Company, in what capacity? A I am store detective.

Q How long have you been so employed? A Four years and two months.

Q Were you present at the accident on November 15th, 1945, in which a child was hurt? A Right.

Q Did you see the accident? A No, I didn't.

* * * *

447 By Mr. Canfield:

Q You say you did not see the accident? A No, I didn't.

Q When you got there, was the child still there? A When I—

Q What, if anything, did you do? A Mr. Faurer picked the child up and handed it to me, and I carried it to the hospital room.

Q You saw no part of the accident at all? A No.

Q Was the escalator stopped when you got there? A Yes, sir.

Mr. Canfield: Take the witness.

Cross-Examination

By Mr. Wood:

Q Who was Mr. Faurer, Mr. Lewis? A Mr. Faurer?

* * *

448 Q What capacity was he there with the Hecht Company? A He was a furrier.

Q When you say you are store detective, was that the same capacity that you were in on November 15th, 1945?

A That is right.

Q Did they have more than one store detective? A Yes, sir.

Q Where were you stationed, Mr. Lewis? A I was stationed on the second floor.

Q Where would your ordinary station on the second floor be, all over the second floor? A All over the second floor, yes, sir.

Q I gather that you were watching certain things pertaining to the operation of the store, and so forth, on the entire second floor? A That is right.

Q Pretty big floor, isn't it? A Yes, sir.

Q What attracted your attention to this accident? A Well, I was standing about fifty feet from the escalator running from the third floor down to the second

449 floor and I heard a lady yelling for help. I rushed over to the escalator as quick as I could get there.

Q And that lady hollered for help more than one time, didn't she? A Probably did, but all I heard was the first, and I ran over. I didn't pay any more attention to it.

Q Who was with you, if anyone, when you heard that? A No one.

Q Were you walking or standing? A I was standing.

Q Facing the elevator, with your back to it? A No, I was facing the escalator.

Q Facing it? A That is right.

Q Now, I show you Plaintiffs' Exhibit 3, which shows the escalator, the down escalator from the third to the second floor, could you see the opening in the escalator from where you stood? A No, sir.

Q You could not see it at all? A No, sir.

Q When you heard the scream and looked around, then you could see the base of it, could you not? A No, there were two tables in front of me with merchandise on,
450 see, and I ran around the tables to the escalator.

Q Did you see Miss Kracke there? A Yes, sir, Miss Kracke was there.

Q Where was she when you got there? A She had cut the escalator off and was standing there, so far as I remember — I don't quite —

Q Did you see her cut it off? A It was off before I got there.

Q You didn't see her cut it off, did you, Mr. Lewis? A No, sir, she had already cut it off.

Q She merely told you she had cut it off, is that right? A Yes.

Q So you don't know that she cut it off, do you? A No, but I would say it was within twenty or thirty seconds after the lady yelled for help.

Q Did you see Mr. Jack Katz there? A No, sir, I didn't, because I didn't pay no attention, I just ran over to the escalator.

Q Is Mr. Jack Katz superintendent of floor managers?

A That is right.

Q Are you under his supervision? A No, sir.

451 Q Whose immediate supervision are you under?

A I come under Mr. Morse.

Q He is one of the officials of the corporation? A He is one of the officials; then I have a boss over me by the name —

Q Mr. Herman? A Yes, sir, Mr. Herman, he is the head of the detectives.

Q Where was the child when you got to the bottom of the down escalator from the third floor to the second floor?

A Mr. Faurer was picking her up.

Q Mr. Faurer picked her up? A Faurer, yes, sir.

Q How close were you to the bottom of the escalator when he did that? A Well, I was practically there because —

Q Then you saw him pick her up? A I seen him pick her up, yes, sir.

Q He picked her up in his arms, didn't he? A That is right.

Q Did you look at either of her hands? A I just glanced, when he handed her to me I went up to the third floor hospital room, I did see her hand, she was holding her hand up like this [indicating].

452 Q The right hand little finger was completely severed and hanging there by the skin, was it not? A That is right.

Q A complete severance, was it? A Yes.

Q The back of the hand was open to the bone? A I noticed this finger was cut far back.

Q The back of the hand was torn wide open, wasn't it? A Yes, it looked so to me.

Q You took over immediately when Mr. Faurer handed it to you? A I ran towards the escalator going to the third floor, I went up the escalator.

Q You did, you didn't walk? A No, sir.

Q Where was the first aid room at that time? A On the third floor.

Q The third floor? A Yes, sir.

Q So you had to go one floor up to get to the first aid room? A Yes, sir.

Q Who was there when you carried the child in? A Miss Haas, the nurse.

453 Q Anyone else? A They had another nurse there, but I don't know what her name is.

Q There were two; you recall one named Miss Haas. A That is right.

Q When you saw Mr. Faurer pick the child up she was sitting down on the escalator, wasn't she, facing the escalator? A She was down on the bottom step of the escalator, yes, when he picked her up.

Q Did you hear any screaming? A Yes, I did hear screaming when he reached down and picked her up.

Q On the escalator? A Yes, a part of her was on the escalator and a part of her was off the escalator.

Q Do you know — I will withdraw that.

How long have you been employed at the Hecht Company, Mr. Lewis? A Four years and two months.

Mr. Wood: I think that is all, Your Honor.

Mr. Canfield: No questions.

The Court: All right, you may step down.

* * * *

454

Jack Fauer

* * * *

By Mr. Canfield:

Q Mr. Fauer, would you please spell your name for us.

A Jack Fauer, F-a-u-e-r.

Q Where are you employed, Mr. Fauer? A At the present time at Phillipsborn's.

* * * *

Q Were you ever employed by the Hecht Company? A

No, sir.

455 Q By whom were you employed in 1945? A I was employed by the District Fur Company.

Q In what capacity, Mr. Fauer? A. Fur estimator and buyer.

* * * *

Q Did your duties take you at any time to the Hecht Department Store? A Yes, sir.

Q In what respect? A Estimating on repairs and new models of garments on the floor and sending out estimates on some goods that were brought in for storage

Q Were you in the Hecht Department Store on November 15th, 1945? A I was.

Q What time would you say you got there that day, was it in the morning or afternoon? A About 9:00 o'clock or a quarter past nine.

Q Now, did there come a time during the morning when something happened with reference to this little child? A Yes, sir.

Q Did you see the accident yourself? A Yes, sir.

456 Q Tell the Court where you were, what you were doing and what you saw. A I was descending from the third floor on the down escalator to the second floor, and in front of me there was a woman hollering about six or eight steps in between the two of us there on that escalator. I was going down. This woman shouted, "Help. Help." And as I was going down she stepped back, and when I reached the landing on the second floor this lady went to see — to cross over, she sort of looked around, and there was a child there who was caught, you see, her hand was caught, and of course, you know, I thought the sleeve of her coat was caught in the escalator.

Mr. Wood: I object to what he thought.

* * * *

Q Just tell us what you saw, not what you thought.

The Court: Just tell what you saw.

The Witness: I saw the child's hand caught in the escalator, and I immediately bent over and pulled out her hand and her coat, and picked up the child and gave it to Mr. Lewis.

* * *

Q Had the escalator stopped at the time you got the child out? A Yes, sir.

457 Q Do you remember who stopped the escalator?

A No, I don't.

Q Had the escalator stopped before you reached over and got the child? A Yes, sir.

Q With reference to the child's coat sleeve, did you see any part of that caught in the mesh, in the steps? A It was caught in the steps.

Q Was the hand also caught? A Well, as I said before, you see, the hand got caught, it evidently was.

Q It was caught? A Yes, sir.

Q Was it necessary to stand on the escalator to free the child's hand? A No, sir.

Q When you picked the child up did you make any observation of the child's condition? A No, I didn't. All I saw was the blood, you see.

Q What did you do with the child? A I gave it to Mr. Lewis.

Q Did you know Mr. Lewis at that time? A I knew him, you see, as an employee of the Hecht Company.

458 Q What did Mr. Lewis do with the child? A I think he took her upstairs to the first aid department.

Q Now at the time you reached over to get the child, was the mother there at that time, was Mrs. Jacobsen there? A Well, the mother was on the escalator, you see, and when she stepped over the child, then I bent down and I picked up the child.

Q Did you see her pushed out in the aisle or anywhere out on the floor? A No, sir.

Q Did the mother know that the child was taken upstairs? A I don't know if she did or not. I don't know.

As soon as I gave the child to Mr. Lewis you see, and he took the child up to the first aid, I think the mother went along.

Q Were there many people in front of the child when you got there — were many people collected? A No.

Q Were there some? A Yes, there were some, I would say about seven or eight, something like that, I don't know how many.

Mr. Canfield: Take the witness.

Cross Examination

By Mr. Wood:

459 Q Mr. Fauer, seven or eight that you saw were accumulated around the base of the escalator, weren't they? A That is right.

Q You say that you heard the child holler, "Help. Help." A No, I didn't say that I heard that; I heard the mother hollering help.

Q She hollered help more than once, didn't she? A Twice, "Help. Help."

Q After you heard that "Help. Help," didn't you hear it down at the base of the escalator three more times? A No, sir.

Q Are you positive of that? A Definitely.

Q Now, the child's hand was caught, as you have stated, right in the escalator between the step as it goes under the comb plate, wasn't it? A That is right.

Q Was it difficult to get it out? A That is right.

Q The escalator kept on winding until it stopped, didn't it? A No, sir.

Q It didn't? A No, sir. I am positive.

460 By Mr. Wood:

Q You didn't stop it, did you? A No, sir.

Q Who did, do you know? A I don't know.

Q It was not stopped for some time after you pulled the

hand out? A No, it was stopped before I pulled the hand out of the escalator.

Q But I say, you didn't get to where the child was, where its hand was caught until after the escalator was stopped, did you? A I did. You see, as soon as the mother hollered "Help, Help," I would say it took less than half a minute, the escalator, she was stopped.

Q Less than half a minute, thirty seconds, about
461 twenty seconds? A About that, I said.

Q You said half a minute, that is thirty seconds, isn't it? A I stand corrected.

Q Thirty seconds is correct? A No, sir, I said about half a minute, it might be twenty seconds.

Q All right, at any rate, you have been on the escalators around in Hecht's before, haven't you? A Yes, sir.

* * * *

462 Q Had to go right along when it was in motion, didn't it? A That is right.

Q The child was laying at the bottom of the escalator with the hand caught in it, wasn't she? A That is right.

Q Isn't it true then that in thirty seconds that at least thirty steps or more would have passed under the comb plate? A No, I would not say that many.

Q You would not? A No, I would not.

Q It was running at the normal speed, wasn't it? A That is right.

Q It was going real fast, wasn't it? A No.

Q The usual rate, wasn't it? A That is right.

Q Where did you see the blood, Mr. Fauer? A Dripping out of her hand.

Q You looked at the hand, didn't you? A No, I didn't.

Q You didn't look at the hand? A No, sir.

Q Where were you standing when you picked her
463 up? A I was by the escalator.

Q You had to bend over to pick her up, didn't you? A That is right.

Q You were facing the escalator, weren't you? A Yes, sir.

Q You would have to turn around so as to face the escalator, lean down and pick the child up, is that right? A That is right.

Q You saw Mr. Lewis there, didn't you? A No, I didn't see Mr. Lewis until I got up, you see, I had the child in my arms, then I saw Mr. Lewis.

Q You knew Mr. Lewis, you had seen him at the Hecht's Company, hadn't you? A That is right.

Q How long before November 15, had you been dealing with the Hecht Company? A Oh, I should say about two and a half years.

Q Two and a half years, and you knew the floor lady on the second floor, Miss Kracke, did you? A No.

Q You didn't know her? A No.

Q You knew the supervisor of floor managers
464 Jack Katz, didn't you? A No—Yes, I know him when I see him.

Q You know Mr. Bray, the chief engineer, don't you? A No, sir.

Q You do not know him? A No, sir.

Q You do know Mr. Lewis? A I knew him, you see, by working in the store, I had nothing in common with him, I never spoke to him.

Q Just seeing him in the store? A That is right.

Q He is the man you handed the child to when you picked it up? A That is right.

Q And you say you didn't look at the hand? A No.

Q It was cut so bad, and you didn't even look at it? A No, that is right.

Q What is right? A I said "No, I didn't."

Q Why didn't you? A You know, when an accident happens and you come to the rescue, you want to help the child, you see. When this happened Mr. Lewis was
465 there. I gave the child to Mr. Lewis and he brought it up to the first aid. It was nothing to me, you see.

* * *

466 [The witness was excused.]

Mr. Canfield: The defense rests.

Mr. Wood: No rebuttal, plaintiff rests.

The Court: That concludes the evidence then except for the view of the premises, is that right?

Mr. Wood: Yes, Your Honor.

The Court: When can we—suppose you come to the bench.

[Counsel for both sides approached the bench and conferred with the Court as follows:]

The Court: When can we view the escalators, have you found out yet?

Mr. Canfield: I have some idea. Now as to whether or not you want—

* * *

467 Mr. Wood: I want to include both types, of course, but I think it should be under Your Honor's supervision. If I may suggest as to the scope, or how far it should go when they get there, so that there will be—

The Court: My understanding is that the object of the view is to see the two escalators, the one here involved and the other type that has been testified about in operation. I think the members of the jury, counsel, and the clerk, and maybe the Court, if it is thought desirable, riding from one floor to the other on them and viewing them. I do not think any questions ought to be asked or information given at the time.

* * *

468 The Court: No, the first floor going up to the third?

Mr. Wood: Up to the fourth and down to the third, and down to the second, it seems to me that would take in everything.

469 The Court: It looks to me as though that ought to suffice.

* * * *

470 [Counsel returned to the trial table and the trial proceeded as follows:]

The Court: Following our usual luncheon adjournment we are going to the Hecht Company to see the escalators involved, and also another type that has been testified to in operation on another floor.

* * * *

472 [The Court, counsel, clerk, jury and reporter assembled and walked to the Hecht Company store where a view of the escalators was had.]

* * * *

474 *Court's Instruction A in Lieu of Plaintiff's
Instruction No. 12 and Defendant's
Instruction No. 8*

A minor is not held to the same standard of conduct as an adult and is only required to exercise that degree of care which ordinarily is exercised by minors of like age, mental capacity and experience. There is no precise age at which, as a matter of law, a child comes to be held accountable for his actions by the same standard as applies to an adult. It is for you to determine the mental capacity and experience of Betty-Lynne Jacobsen, the minor herein, and whether her conduct was or was not such as might reasonably have been expected from a minor of like age, capacity and experience under the same or similar circumstances.

Court's Instruction B in Lieu of Plaintiffs' Prayer No. 11

The jury are instructed as a matter of law that the contributory negligence, if any, of Helena Jacobsen, mother of the infant plaintiff, Betty-Lynne Jacobsen, at the Hecht Company store on November 15, 1945, the day in question, is not imputed to the infant plaintiff, and does not preclude said infant plaintiff from recovery in this case for her own injuries, if said injuries were proximately caused by the negligence of the defendant.

475

Plaintiffs' Prayer No. 1

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use proper care in the management of one's property or person.

Inasmuch as the amount of caution used by the ordinarily prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that the exercise of proper care, the amount of caution required, will vary in accordance with the nature of the act and the surrounding circumstances. To put the matter in another way, the amount of caution required by the law increases, as does the danger that reasonably should be apprehended. In this case it was the duty of the defendant, The Hecht Company, Inc., to use the highest degree of care for the safety of the infant plaintiff. [Withdrawn]

Plaintiffs' Prayer No. 2

If the jury believe from the evidence that on or about November 15, 1945, the plaintiff was injured (by reason of the dangerous construction of the escalator), and
 476 further that said injuries resulted from a want of the highest degree of care on the part of the defendant, The Hecht Company, Inc., (in the construction, maintenance and operation of said escalator) then their verdict should be for the plaintiff. [Granted as amended.]

Plaintiffs' Prayer No. 2-A

The jury are instructed as a matter of law, that if they find from a preponderance of the evidence that the defendant was guilty of any one of the acts of negligence alleged

in the complaint and that such negligence was the proximate cause of the injuries sustained by the infant plaintiff, then their verdict should be for the infant plaintiff. [Withdrawn.]

Plaintiffs' Prayer No. 3

It is ordinarily necessary to exercise greater care for the protection and safety of a young child than for an adult person who possesses normal physical and mental faculties. One dealing with children must anticipate the ordinary behavior of children. The fact that they usually cannot and do not exercise the same degree of prudence for their own safety as adults, that they are often thoughtless and impulsive, imposes a duty to exercise a proportional vigilance and caution on those dealing with children and
477 from whose conduct injury to a child may result.
[Granted.]

Plaintiffs' Prayer No. 4

As an operator of the escalator, referred to in the evidence, the defendant in the transportation of the infant plaintiff, Betty-Lynne Jacobsen, as a passenger, was required to use the highest degree of care for the safe carriage of said infant plaintiff, as a passenger. This highest degree of care does not make the defendant an insurer of the infant plaintiff's safety, but it does require the defendant to exercise all the care and skill and foresight within reason for the safe carriage of its passengers. A failure to exercise that degree of skill constitutes negligence, and if such negligence is the proximate cause of injuries to the infant passenger, the defendant would be liable. [Granted.]

Plaintiff's Prayer No. 5

The Court instructs the jury as a matter of law, that they must decide this case on the evidence adduced here.

The jury are sole judges of the facts in this case. In considering the case, the jury should take into account the interest of witnesses in the result of the suit, and consider the possibility of bias because of such interest. The jury are further instructed that it is their exclusive
 478 province to determine the credibility of any witness. [Withdrawn.]

Plaintiffs' Prayer No. 6

If the jury shall find from the evidence that the infant plaintiff, Betty-Lynne Jacobsen, is entitled to recover from the defendant, it then becomes its duty to award reasonable damages for the injuries that they may find from the evidence said plaintiff sustained.

In fixing the amount of the damages, the jury are instructed that she is entitled to fair and reasonable compensation for all physical injuries and shock as may be shown by the evidence to have been sustained by her, the character and extent of her physical disabilities at the time the injuries were sustained, and the extent of the injury to the infant plaintiff's right hand, back of right hand, and permanent disfiguration to right hand and permanent loss of right little finger, as shown by the evidence, and for the pain, discomfort and inconvenience which the evidence shows she has suffered and may hereafter suffer on account of or as a result of her said injuries. [Granted.]

479

Plaintiffs' Prayer No. 7

The jury are instructed that if they find, from the evidence, that the plaintiff, S. Elmer Jacobsen, is entitled to recover from the defendant, it then becomes its duty to award reasonable damages for the loss of expenses already incurred and which in the future (which it is reasonably certain were) be incurred by him, and for future loss of

(services) of his infant daughter, before she becomes of age, which they may find, from the evidence, the plaintiff, S. Elmer Jacobsen, may sustain. [Granted as amended.]

Plaintiff's Prayer No. 8

A party has succeeded in carrying his burden of proof on an issue of fact, if the evidence favoring his side of the question is more convincing than that tending to support the contrary side, and if it causes the jurors to believe that on that issue the probability of truth favors that party. [Covered by general charge.]

Plaintiff's Prayer No. 11

The jury are instructed, as a matter of law, that the conduct of Helena Jacobsen, mother of the infant plaintiff, Betty-Lynne Jacobsen, at The Hecht Company
480 store on November 15, 1945, the day in question, in no way affects the action of the infant plaintiff for her own injuries and does not preclude said infant plaintiff from recovery in this case for her own injuries. [Denied. See Court's Instruction B.]

Plaintiff's Prayer No. 12

The rule of law in regard to the negligence of an adult and the rule in regard to that of an infant of tender years is quite different. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than one of seven; and of a child of seven less than one of twelve or fifteen. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case. [Denied. See Court's Instruction A.]

Defendant's Instruction No. 1

The jury are instructed as a matter of law that before the plaintiffs can recover in this case, they must establish by a fair preponderance of the evidence two necessary factors, they must first establish that the defendant committed (an) acts of negligence, secondly, they must
481 establish that the negligence was the proximate cause of the injuries sustained by the infant plaintiff. If the evidence fails to establish either of these two factors, then their verdict must be for the defendant. [Granted.]

Defendant's Instruction No. 2

The jury are further instructed as a matter of law that the defendant is not required to maintain the newest or most modern appliances in its store. If the jury find by a preponderance of the evidence in this case that the escalator in 1934 was purchased from a reputable manufacturer and that its use was common for the purpose indicated, then the defendant would have fulfilled its duty so far as furnishing a reasonably safe place for the use of its customers and their verdict must be for the defendant. [Denied. Exception noted.]

Defendant's Instruction No. 3

The jury are further instructed as a matter of law that if the evidence in this case establishes that in 1940 there was a more modern or improved escalator on the market and the defendant failed to install it in their store, this fact alone cannot be found to be an act of negligence on the part of the defendant unless it appears from a fair
preponderance of the evidence that the more mod-
482 ern or improved device referred to was such as would (reasonably) have prevented the accident suffered by the infant plaintiff. In this regard it will be necessary for the plaintiff to have shown that the new device would have ruled out any likelihood of injury or

damage to the infant plaintiff under the evidence presented in this case. [Denied.]

Defendant's Instruction No. 4

The jury are further instructed as a matter of law that the failure or omission of the defendant to install the more modern or up to date escalator when the same came on the market, is not in and of itself an act of negligence, unless it appears from a fair preponderance of the evidence that a person exercising the highest degree of skill and foresight within reason for the safe carriage of his passengers would supplant the old installation with the new and would not continue to use the old installation because of the hazard to his passengers. [Granted.]

* * * *

483

Defendant's Instruction No. 5

The jury are instructed as a matter of law that however if from a preponderance of the evidence
484 in this case, you find that the mother was negligent in the manner in which she looked after the infant plaintiff while in defendant's store, and as a result of her negligence, she either was the (sole) cause, or contribute(ing) cause of the injuries, even though you may find the defendant also guilty of negligence, you are not permitted to award any damages to the plaintiff father. [Granted.]

Defendant's Instruction No. 6

The jury are instructed that there are two claims here for your consideration, namely, a claim by the child for damages sustained by the child herself as a result of the negligence of the defendant. This child being an infant under 21 years of age, under our law cannot maintain an action in his own name, and for that reason it must be

brought on his behalf by some one acting as we say in law "his next friend." Such damages if awarded by you would be for the child only. The companion action is brought by his father, as his parent who claims damages for himself for such things as monies expended by the father for medical care and attention, hospital expenses, or any other expenses found by you from the evidence to be occasioned by the father as a result of the girl's injuries. Such damages would be as compensation to the father for the monetary losses suffered by him on behalf of his daughter; of exceptional foresight, skill or caution, still no one may be held liable for injuries resulting from it. Both negligence and proximate cause as defined by the Court are requisites for founding liability. [Granted.]

Defendant's Instruction No. 7

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of the mere happening of an accident is no proof of negligence. The plaintiffs have the burden of proving negligence on the part of the defendant before they can recover in this case. [Granted.]

Defendant's Instruction No. 8

The jury are instructed as a matter of law that while a lesser degree of care is required of an infant of tender years than that of an adult and that this degree of care depends upon the intelligence, the age and knowledge of the infant, still a child of almost four years
485 of age depending upon these factors may be held to be guilty of contributory negligence. It is for the jury to say by a preponderance of the evidence in this case

whether or not the infant plaintiff was capable and intelligent enough to appreciate the danger of its conduct in going down the moving escalator steps under the conditions described by its mother. If the jury find by a preponderance of the evidence that the child could and did understand the danger of what it was doing, then the child may be held guilty of contributory negligence and if you find this to be a fact, then there can be no recovery in this case for either plaintiff. [Denied. See Court's Instruction A.]

* * * *

504 Now the expenses in this case were little. The father sued for the expenses, the loss of the services of his daughter, the expense does not run to much over a hundred dollars, the bill at the Children's Hospital, the operating room, the anesthesia, whatever occurred after the fifty dollars to Dr. Coffey—Dr. Coffey charged nothing for the operation or care up to the time he left the Navy, and fifty dollars for the care he rendered after he left the Navy, but that care was the care he gave to her in the office. Look at the hand, you looked at the picture, Dr. Coffey did a marvelous job in a bad situation to save the rest of the hand. It is not surprising, with that sort of a cut, that she may have lost the entire arm or the entire hand. The existing expense, as I say, does not amount to more than a hundred and twenty or a hundred and twenty-five dollars, but there is other expense contemplated. The hand may or may not be improved, the keloid scar tissue may be removed. Dr. Coffey says surgery could give no assurance that it—if it did have an operation and it did cure her, that it would not leave a big scar. You know, and I know, it will always leave some kind of a scar—he said that a person who is susceptible to a keloid scar condition, when they do have a plastic

505 repair operation, the scar sometimes comes back, that it might be, if it is reasonably feasible and advisable to have a plastic repair operation, and that might

cost, according to him, in the neighborhood of between \$750.00 and a thousand dollars.

* * * *

514 "The jury are instructed that there are two claims here for your consideration, namely, a claim by the child for damages sustained by the child herself as a result of the negligence of the defendant. This child being an infant under twenty-one years of age, under our law cannot maintain an action in his own name, and for that reason it must be brought on his behalf by someone acting as we say in law 'his next friend.' Such damages if awarded by you would be for the child only. The companion action is brought by his father, as his parent who claims damages for himself for such things as monies expended by the father for medical care and attention, hospital expenses, or any other expenses found by you from the evidence to be occasioned by the father as a result of the girl's injuries. Such damages would be compensation to the father for the monetary losses suffered by him on behalf of his daughter; however, if from a preponderance of the evidence in this case, you find that the mother was negligent in the manner in which she looked after the infant plaintiff while in defendant's store, and as a result of her negligence, she either was the sole cause or contributing cause to the injuries, even though
515 you may find the defendant also guilty of negligence, you are not permitted to award any damages to the plaintiff's father."

* * * *

528 I submit to you from what you saw yesterday that the fingers didn't go down into the openings between the comb plate. The fingers were caught in this direction, because, as you will recall, the damage was not done there, it was done to the back of the hand, which indicated the manner in which it struck in holding it up against

the comb plate, and I submit to you it could have
 529 happened in no other way, because this apparatus
 must have a moving staircase, no matter how big
 an aperture, the steps have to break and go under the
 comb plate, so it was not the failure to put in the new
 model that was the compelling cause of this thing.

* * * *

530 The only negligence in this case is simply were
 we under a legal duty as a question of fact, from
 what you have seen in this case, should we, in the per-
 formance of that duty, have thrown out the 1934 escalators
 because there were new ones installed in 1941, is all you
 have to determine. So I say to you that this case can be
 left to you in a very simple manner. I am perfectly satis-
 fied to take your judgment—I don't mean to have you infer
 that I am indifferent to this child's injury, because I am
 not, I have six children of my own, but I have a duty to
 my client, and that client is charged here with causing
 an accident, which as we felt at first and have always felt,
 was not caused by any negligence on our part.

* * * *

539 So, under all the circumstances of the case, we
 come to consider the situation as to what this injury
 540 is and what the law provides as to how a person shall
 be compensated for an injury at the hands of a negli-
 gent defendant.

Mr. Canfield: If the Court please, that is not rebuttal.
 I did not discuss the injury.

Mr. Wood: Well, I addressed them—

Mr. Canfield: I know, but I didn't.

The Court: Wait a minute. What sort of statement
 is it, Mr. Canfield, that you think is not rebuttal?

Mr. Canfield: The discussion as to the injuries. I
 made no discussion of that at all.

The Court: No, try to confine yourself to answering
 what Mr. Canfield said, Mr. Wood.

Mr. Wood: My understanding of the rule, Your Honor, was that if I made it in the opening and he followed me, then I can certainly in this type of case refer to the injuries in conclusion. Perhaps it should not have been done.

The Court: I think it is within your province to allude to his failure to make any comment on any—

Mr. Wood: I wonder why, then, Mr. Canfield did not allude to the injuries in this case. They are serious enough; certainly this child under the circumstances we have been discussing, is going to be met with them the rest of her life. She has two definite permanent injuries, the loss of the finger and a bad scar to the hand, and
541 will have them for the rest of her life.

Now, under these circumstances it is a question. If you feel that the defendant is negligent in this case, and I believe sincerely it is, we come to a consideration of what is fair and reasonable compensation for the injury.

Mr. Canfield: I object to that part of the argument, if the Court please, as to not being proper rebuttal under the law.

The Court: I do think counsel has a right, Mr. Canfield, to bring in anything you addressed them on.

Mr. Canfield: I quite agree, but I did not discuss the compensation features of this case at all.

The Court: I think he is alluding to the evidence, as I understand.

Mr. Canfield: He has already done that, now he is going—

The Court: Let's go ahead, the jury is not going—

Mr. Wood: I certainly have the right to tell this jury what these injuries, in my humble opinion are worth. They are to pass on it. He cannot foreclose me because he mentioned nothing about them.

Mr. Canfield: I think the civil rule—

Mr. Wood: Let's have the rules.

Mr. Canfield: I say that I did not go into that feature

of the case in my argument, and if I did not, there
542 is no rebuttal.

Mr. Wood: I want to show what they are claiming by way of compensation for injuries sustained.

The Court: Gentlemen, proceed.

Mr. Wood: It is an attempt to show that the loss of a finger, what the injury to the hand of a child of this age, who will go through life with it, is worth; it is an attempt to show the pain and suffering attached to it when it occurred, it is an attempt to show the mental anguish and suffering that this little child went through and will go through in the future, and what is fair and reasonable compensation to her for the injury she sustained as a result of the negligence of this defendant in this case.

It is exclusively within your province and right to decide the facts as they are.

With reference to the testimony that Mr. Canfield read, I notice that the first part of it he didn't read and so I say it must be decided by your recollection as to the entire testimony of Mrs. Jacobsen. You will recall her testimony from the beginning, you will recall the testimony of Mr. Jacobsen from the beginning to the end of his testimony was straightforward. All he knew about the case was when he was called to the hospital.

Mr. Canfield: I object to this part of the argument.

The Court: No, that is proper, go ahead.

543 Mr. Canfield: I have noted my objection.

Mr. Wood: Everything that he said about this condition shows exactly the condition that existed on November 15th, 1945.

He has a right to recover any expenses that he might have been put to, although little up to this point, certainly no criterion as to what you should allow in this case if you find for the plaintiff. A plastic repair operation is bound to cost money, and you should take that into consideration, and you should take into consideration the other expenses that he may be put to as a result of this,

and you should also take into consideration the loss of services of the daughter to which he is entitled as a father up until she is twenty-one years old by reason of this injury.

With reference to the child's case, you should take into consideration the permanency of the injuries she sustained in arriving at any verdict you may see fit to arrive at, if you find and believe that there is negligence in the case as the plaintiff's evidence shows beyond peradventure of a doubt. You should also keep in mind that if they used this instrumentality, and it is dangerous and caused injury, they are liable.

Keep in mind, ladies and gentlemen of the jury, that the highest degree of care is owed to this little plaintiff.

544 I submit to you that under all the facts and circumstances in this case that you should award a verdict for both plaintiffs, and that your award for the infant plaintiff in this case should be in a substantial amount, because the injuries are definite and permanent, the scar on her hand, we say, demands a substantial amount in compensation, and I think the loss of a finger, aside from what she will go through the rest of her life in relation with it, so I say to you under all these circumstances as presented by the evidence, your award should be made to both. Keep in mind that this is this child's day in court. When you have once spoken with your verdict that is the last word that can be said. You are the exclusive judges of the facts, in awarding any amount that you see fit for this infant plaintiff, as well as the father, and that once you have spoken the last word, that is the last word that can be said.

* * * *

545

Instructions of the Court

The Court: Now, members of the jury, this is an action which I am certain you understand is for the recovery by the infant plaintiff of damages from the defendant for injuries received by the infant plaintiff as a result of the alleged negligence of the defendant.

Now it is very necessary for you to understand, in order to decide that issue, as to whether or not the infant plaintiff should recover, what is negligence. If there be negligence that caused the injury which was the proximate cause of it, and there is no contributory negligence on the part of the infant child, then there should be a recovery. If there is not any negligence on the part of the defendant, or if there be negligence the result of the negligence of the infant child — on the part of the infant child, and that is the proximate cause of the injury, then there cannot be any recovery, so it is very essential for you to understand what is meant by negligence.

Now negligence is the failure to exercise that degree of care which the law imposes upon a person. Now that degree of care may vary according to what the relationship of the parties is, it may vary according to the person, the circumstances of the case, and let's examine what de-

546 degree of care is imposed by the law here upon the defendant to determine whether or not there has been the failure to exercise that degree of care which would be negligence.

You must understand the degree of care that is cast upon the infant child here involved to determine whether or not there was a failure to exercise that care required of an infant child which would be negligence, and which would bar recovery if that negligence contributed proximately to the injury.

We must examine what is the degree of care the law places upon the mother so as to determine whether there

was a failure on the part of the mother to exercise the degree of care imposed upon her, and if so what the effect of the failure of the mother to exercise this degree of care, if the failure proximately caused the injury to the infant plaintiff.

Now first let us see what negligence is with respect to a person having the duty to exercise ordinary care. Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person.

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own
547 affairs. Now that is the degree of care required of persons ordinarily. It is the degree of care that the law places upon the mother in this case in watching after the welfare of her infant child. That is the yardstick by which you measure her actions.

Now the degree of care required of this defendant is a higher degree of care than that. As an operator of an escalator referred to in the evidence, the defendant, in the transportation of the infant plaintiff, Betty-Lynne Jacobsen, as a passenger, was required to use the highest degree of care for the safe carriage of such infant plaintiff as a passenger. This higher degree of care does not make the defendant an insurer of the infant plaintiff's safety, but it does require the defendant to exercise all due care, skill and foresight within reason for the safe carriage of its passengers. The failure to exercise that degree of care constitutes negligence, and if such negligence is the proximate cause of the injury to the infant passenger, the defendant would be liable. That is the standard by which you measure whether or not there is negligence on the part of the defendant.

Now there is even a different degree of care required of a minor from that required of the mother, the adult. A minor is not held to the same standard of conduct as an adult and is only required to exercise that degree
 548 of care which ordinarily is exercised by minors of like age, mental capacity and experience. There is no precise age, as a matter of law that a child comes to be held accountable for its actions by the same standard as applies to an adult. It is for you to determine the mental capacity and experience of Betty-Lynne Jacobsen, the minor herein, and whether her conduct was or was not such as might reasonably be expected of a minor of like age, capacity and experience under the same or similar circumstances.

Now there you have the three yardsticks that you are to use in applying to the conduct of the defendant, which was the highest degree of care to the mother, which is the standard of ordinary care; to the minor, whose standard of conduct is that of a minor of like age, experience and mental capacity.

Now the failure of either one of those to come up to that standard would constitute negligence on the part of such as did not come to the particular standard applied to that person, and if such want of care, according to such standard, which would be negligence, is the proximate cause of the injury, then it has the effect which I shall presently undertake to explain to you. In other words, if there be negligence on the part of the defendant by failing to come up to the standard required of the defendant, and that negligence
 549 was the proximate cause of the injury, then the plaintiff could recover, unless the failure of the infant plaintiff on her part to come up to the standard required of an infant, and that negligence was a contributing proximate cause to the injury, that would bar her recovery. If the mother's conduct did not come up to the standard required of the mother, and her negligence was the proximate cause of the injury, then the father

could not recover in this case, and if such negligence was the only proximate cause, that is, the defendant was not negligent, then, of course, the infant could not recover, because there would be no negligence on the part of the defendant.

Now, in much of what I have said I used the term "proximate cause" because to establish liability, it is not only negligence that must be proved, but it must be proven that that negligence was the proximate cause of the injury.

Now, let us see what is meant by that term. The proximate cause of an injury is that cause which, in natural and continuance sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred. It is the efficient cause, the one that necessarily placed in operation the factors that accomplish the injury. It may operate directly or by putting intervening agencies in motion.

Now, going back for a moment to the question of the negligence of the defendant, whether or not there
550 was negligence, and if so, whether or not such negligence was the proximate cause of the injury to the infant plaintiff, I say for the plaintiff to recover those things must be established.

Now the burden of proof — the burden of proving those things are on the plaintiff, and that means that the facts of negligence of the defendant, and that such negligence was the proximate cause of the injury, must be proven by what is called the preponderance of the evidence, and the burden of proving that is upon the plaintiff.

Now what is meant by the preponderance of the evidence? Well, it simply means this, that those facts to justify recovery must be shown by evidence which is more satisfying and convincing to you of its truth than the evidence on those issues to the contrary. It does not necessarily mean the greatest number of witnesses; it does not necessarily mean the greater mass of evidence, but it does mean just what I have said, that the evidence tending to

prove those issues must be more convincing, more satisfying to you as to its truth than the evidence on those issues to the contrary. If it is neither more nor less convincing, it does not preponderate. Of course, if it does not, then it does not preponderate but if it is more satisfying and convincing to you than the evidence on those issues to the

contrary, then it does preponderate, which means it
 551 weighs heavier with you and that is the measure by which you determine whether the plaintiff has carried the burden of proof that rests upon him.

Now the defendant here says that there was no negligence on its part. It denies that it was negligent; it denies that the escalator which it had in operation was negligently constructed, and it rests upon the plaintiff in order to recover to prove that there was negligence, that there was the want of the highest degree of care, that skill and foresight within reason which could have been used to prevent injuries which would likely and reasonably be expected to occur. I say it rests upon the plaintiff to prove that negligence in order to recover, and to prove that that negligence was the proximate cause of the injury in order to recover by a fair preponderance of the evidence as I have already explained it to you.

So, as I say, the defendant first put the plaintiff to prove those things. The defendant says it is not negligent, and it also says this, that even though you find that there was negligence on the part of the defendant, that such negligence did not proximately cause the injuries, and that there ought not to be any recovery here because, one, the infant was negligent in that the infant did not exercise that degree of care which was reasonably to be expected from an infant of like age, experience and
 552 mental capacity, and second, that the father ought not to be entitled to recover here because the mother who, as one of the parents, is the same as the father seeking to recover, was negligent, contributorily negligent in that the mother did not exercise that degree of care which

the law imposes upon her, namely, the exercise of ordinary care in taking care of her child to prevent the child from becoming injured.

Now, with respect to the establishing of negligence of either the child to bar its recovery or the establishment of negligence on the part of the mother to bar the father's recovery, the burden is upon the defendant and such contributory negligence as is charged and alleged must be established by a preponderance of the evidence, and the burden of doing that is upon the defendant, and the reason for the burden resting first, on the plaintiff, to prove negligence on the part of the defendant, and the burden on the defendant to prove negligence on the part of the plaintiff, the infant plaintiff or the mother, who stands in the same status as the father who is the plaintiff, is reasonable and understandable, and that is because the law assumes that everybody acts without negligence and in the absence of proof one cannot be held to be negligent, so, to overcome that presumption that persons do not act negligently, the burden of proof is upon the person who asserts that the other was negligent.

553 Now the jury are instructed, as a matter of law, the contributory negligence, if any, of Helen Jacobsen, mother of the infant plaintiff, Betty-Lynne Jacobsen, at the Hecht Company store on November 15th, 1945, the date in question, is not imputed to the infant plaintiff, and it does not preclude said infant plaintiff from recovering in this case for her own injuries if such injuries were proximately caused by the negligence of the defendant. Now that means just what it says, that although each one of them is answerable for any negligence on his or her own part, the little child is not answerable for any negligence on the part of the mother if the child itself was not negligent, and if the defendant was negligent, then the child is entitled to recover, even though the mother may have been negligent.

If the jury believes from the evidence that on or about November 15th, 1945, the plaintiff was injured by reason of the dangerous condition of the escalator and further that said injury resulted from the want of the highest degree of care on the part of the defendant, the Hecht Company, Incorporated, in the construction, maintenance and operation of said escalator, then their verdict should be for the plaintiff, unless, of course, it is shown by the fair preponderance of the evidence that there was contributory negligence on the part of the plaintiff.

554 It is ordinarily necessary to exercise greater care for the protection and safety of a young child than for an adult person who possesses normal physical and mental faculties.

One dealing with children must anticipate the ordinary behavior of children. The fact that they usually cannot and do not exercise the same degree of prudence for their own safety as adults, that they are often childish and impulsive imposes a duty to exercise a proportional vigilance and caution on those dealing with children, and from whose conduct injury to a child may result.

If the jury shall find from the evidence that the infant plaintiff, Betty-Lynne Jacobsen, is entitled to recover from the defendant, it then becomes its duty to award reasonable damages for the injuries that they may find from the evidence that said plaintiff sustained. In fixing the amount of damages the jury are instructed that she is entitled to fair and reasonable compensation for all physical injuries and shock that may be shown by the evidence to have been sustained by her, the character and extent of her physical disability at the time the injuries were sustained, and the extent of the injury to the infant plaintiff's right hand, and the back of the right hand, permanent disfiguration to the right hand, the permanent loss
 555 of the little right finger, as shown by the evidence, and for the pain, discomfort and inconvenience that the evidence shows she has suffered and is reason-

ably certain hereafter to suffer on account of or as a result of said injuries.

The jury are instructed that if they find from the evidence that the plaintiff, S. Elmer Jacobsen, is entitled to recover from the defendant, it then becomes its duty to award reasonable damages for the loss and expenses already occurred and which in the future it is reasonably certain will be incurred by him, and for future loss of services of his infant daughter before she becomes of age, which it may find from the evidence the plaintiff, S. Elmer Jacobsen, is reasonably certain to sustain.

The jury are instructed as a matter of law that before the plaintiff can recover in this case they must establish by a fair preponderance of the evidence two necessary factors. They must first establish that the defendant committed an act of negligence, secondly, they must establish that the negligence was the proximate cause of the injuries sustained by the infant plaintiff. If the evidence fails to establish either of those two factors, then your verdict must be for the defendant.

The jury are further instructed as a matter of law that the failure or omission of the defendant to install the more modern or up-to-date escalator when the same came on the market is not of itself an act of negligence, 556 unless it appears from a fair preponderance of the evidence that the person exercising the highest degree of care, skill and foresight within reason for the safe carriage of his passengers would supplant the old installation with the new and would not continue to use the old installation because of the hazards to its passengers.

The jury are instructed as a matter of law that the mere happening of an accident is not proof of negligence. The plaintiff has the burden of proving negligence on the part of the defendant before they can recover in this case.

The jury are instructed that there are two claims here for your consideration, namely, a claim by the child for damages sustained by the child itself as a result of the

negligence of the defendant, this child being an infant under twenty-one years of age, under our law cannot maintain an action in her own name, and for that reason it must be brought on her behalf by someone acting as we say in law "next friend." Such damages, if awarded by you, would be for the child only.

The companion action is brought by her father as her parent and claims damages for himself and for such things as monies expended by the father for medical care and attention, hospital expenses and any other expenses found by you from the evidence to be occasioned to the father

as a result of the child's injuries. Such damages
557 would be a compensation to the father for monetary losses suffered by him on behalf of his daughter.

However, if, from a fair preponderance of the evidence in this case you find that the mother was negligent in the manner in which she looked after the infant plaintiff while in this store, and a result of her negligence she either was the sole cause or contributing cause of the injury, even though you may find the defendant also guilty of negligence, you are not permitted to award any damages in that event to the plaintiff father.

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such accident to be avoided. They simply denote an accident did occur, without having been the proximate cause — without having been proximately caused by negligence, even if such an accident could have been avoided by the exercise of sufficient foresight and skill or caution. Still, no one may be held liable for the injuries resulting from it. Therefore, negligence and proximate cause, as defined by the Court, are requisite for a finding of liability.

You are the sole judges of the facts in the case, it is for you to say what the facts are from a consideration of all the evidence and a weighing of all the evidence, rejecting such part or parts of it as you do not accept to be

558 true and accurate, basing your judgment on that which you do believe to be true and accurate.

Now in performing that task you will take your recollection of the evidence, and should that recollection differ from that expressed by counsel for either party, or should it differ from that expressed by the Court, if I have had occasion during the trial to express my recollection for any purpose, that I had to act upon, you will take your own recollection and not that of either counsel or the Court.

You are the sole judges of the credibility of the witnesses. That is, it is for you to determine to what extent you believe and accept as true what a witness has testified to.

Now, in performing that task you may call to your aid and assistance certain guides which the law out of long years of experience recognizes to be reliable ones, but not necessarily infallible, and therefore you are to use them to such, and such extent alone, as you believe them to be helpful to you in arriving at the truth. For instance, in weighing the testimony of any witness, you will consider the interest, if any, that such witness has in the outcome of the trial, and consider and determine whether or not such interest has or has not colored or affected the testimony of such witness. You may consider the opportunity or lack of opportunity of a witness to ob-

559 serve and know the matters about which the witness has testified to; you may consider the capacity and ability of a witness to have accurately observed what the witness has testified to; the capacity and ability of a witness to accurately recollect and relate what the witness did observe; you may consider the reasonableness or unreasonableness or probability or improbability of a witness' testimony in helping you to determine whether or not to accept as true and accurate what the witness testified to.

You may consider the appearance and demeanor of a witness on the stand, which is simply another way of saying what all of us do in everyday life, that is consider whether or not a person looks and acts as if that person is fully, frankly, truthfully and honestly relating what the witness knows to be so, or the contrary. You may consider and determine whether or not it has been shown in this case whether any witness is biased or prejudiced, either for or against either party to this case, and if so, whether or not such bias or prejudice has or has not colored or affected the testimony of such witness.

If you find it has been shown that any witness has testified falsely concerning any material fact in the case, as to which the witness could not reasonably have been honestly mistaken, you have the right to disregard and reject entirely all that that witness testified to, on
 560 the principle that one who testifies falsely about one material fact may testify falsely about others or all material facts, or in any event, such a witness is not sufficiently reliable to compel a jury to base its judgment on the testimony of such a witness; but while you have a right to reject entirely all of the evidence or testimony of a witness who has testified falsely concerning a material fact, you are not required to do so, you may, in your good sound judgment, should you think you should, accept as true part of what a witness has testified to, and if you believe it to be true, and even though you do reject as false and untrue other parts of the testimony of such witness, which is an illustration of the wide latitude which the law leaves to your good sound judgment and discretion as to what weight you will give to the testimony of such witness.

Now, if after weighing all the evidence in the case, rejecting such part or parts as you do not believe to be true and credible, and basing your judgment upon that which you do believe to be true and accurate, if you find it has been shown by a fair preponderance of the evidence

as I have defined that to you, that the defendant was negligent, as I have defined such negligence to you, and that such negligence was the proximate cause of the injury to the infant plaintiff, and you do not find it has been shown by a fair preponderance of the evidence that 561 the infant plaintiff was contributorily negligent to her own injury as I have defined that to you, it would be your duty to find a verdict in favor of the infant plaintiff and against the defendant, and fix the damages in such amount which, according to the elements I have stated to you would reasonably and fairly compensate her for the injuries which she did sustain as a result of the negligence of the defendant.

If you believe it has been shown by a fair preponderance of the evidence that the infant plaintiff is entitled to recover from the defendant, and you do not believe it has been shown by a fair preponderance of the evidence that the mother of the infant plaintiff was contributorily negligent as I have defined that to you, it would, in that event, also be your duty to find your verdict in favor of the father plaintiff and fix his damages in such amount which, according to the elements I have stated to you with respect to him would fairly and reasonably compensate him for the damages which he has suffered.

If, on the other hand, you do not believe that the defendant has been shown by a fair preponderance of the evidence, that the defendant was negligent, or if the negligence of the defendant was not the proximate cause of the injury to the infant plaintiff, it would then be your duty to find a verdict in favor of the defendant, and that would also be your duty, even though you found the 562 defendant to be negligent, and such negligence the proximate cause of the injury. If you further find that it has not been shown by a fair preponderance of the evidence that the infant plaintiff was guilty of contributory negligence as I have defined that term to you with respect to the negligence of the infant — rather, if you

find that the mother of the infant plaintiff was contributorily negligent, even though you do find the defendant to be negligent, and such negligence is the proximate cause of the injury of the infant plaintiff, it would in that event be your duty to find your verdict in favor of the defendant with respect to the father plaintiff who seeks recovery of damages as I have defined the damages which he claims to have sustained.

Is there any charge that the Court can give that has not been given, and which counsel thinks — counsel for either party thinks should be given?

Mr. Canfield: I would like to approach the bench.

The Court: Come to the bench.

[Counsel for both sides approached the bench and conferred with the Court as follows:]

Mr. Canfield: You usually give as part of your standard charge that the verdict if there is one, should be based upon the idea of fair compensation, and must not be influenced by sympathy—

The Court: Well, I do frequently say that they
563 are not to be guided by any sympathy for either party.

Mr. Wood: You did tell them the prejudice angle of it already.

The Court: That was with reference to the credibility of the witnesses.

I don't want to tell them they should limit this to fair compensation, that would sound like I was telling them to find a verdict for the plaintiff. I will just tell them that they must not be influenced in any fashion by prejudice or sympathy.

Mr. Wood: I think it is clear, but nevertheless, if they find for both plaintiffs, two separate verdicts.

The Court: All right, I will cover that.

Mr. Wood: While we are here at the bench, I merely want to renew my objection to that portion of Your Honor's charge that we discussed during the discussion on the prayers, that I took at that time.

The Court: You do not have to do that. Everything you have excepted to or objected to is preserved. I do not consider anything to be waived.

Mr. Wood: Well, I take exception to that portion of Your Honor's charge as related to the modern equipment as given in the general charge.

The Court: All right.

[Counsel returned to the trial table and the trial
564 proceeded as follows:]

The Court: It has been suggested that perhaps I had not sufficiently instructed the jury on the fact that you must not be guided in this case in any respect by any sympathy for or prejudice against any of the parties here involved. You must base your judgment solely on your own clear consideration of the evidence. Should you find your verdict in favor of both of the plaintiffs, you should find your verdict for them in separate amounts, naming each up to the amount awarded by you in their favor against the defendant.

You will now retire, choose one of your number as foreman, consider your verdict, and when you have arrived at a verdict, and remember, it is your duty to arrive at a unanimous verdict if you can conscientiously do so, notify the bailiff, and the Court will receive your verdict.

If in the course of your deliberations you discover that some point I have tried to explain to you has not been clearly explained, you may let me know, and I will try to give you a clearer explanation of the particular point that has not been made clear.

You may now retire.

[Whereupon at 3:05 o'clock p.m. the jury retired.]

No. 10035
BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE HECHT COMPANY, INC., a Corporation

Appellant,

VS.

BETTY-LYNNE JACOBSEN, an infant by S. ELMER JACOBSEN,
her father, and S. ELMER JACOBSEN,

Appellees.

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals

for the District of Columbia

Circuit

FILED DEC 7 1948

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lish as a fact that the 1941 model escalator was safer for a child of the infant plaintiff's age, size and temperament or that a child moving down the escalator as the infant child in this case did, would not have its fingers caught between the comb plate and the steps of any later model which might have been installed 19-24

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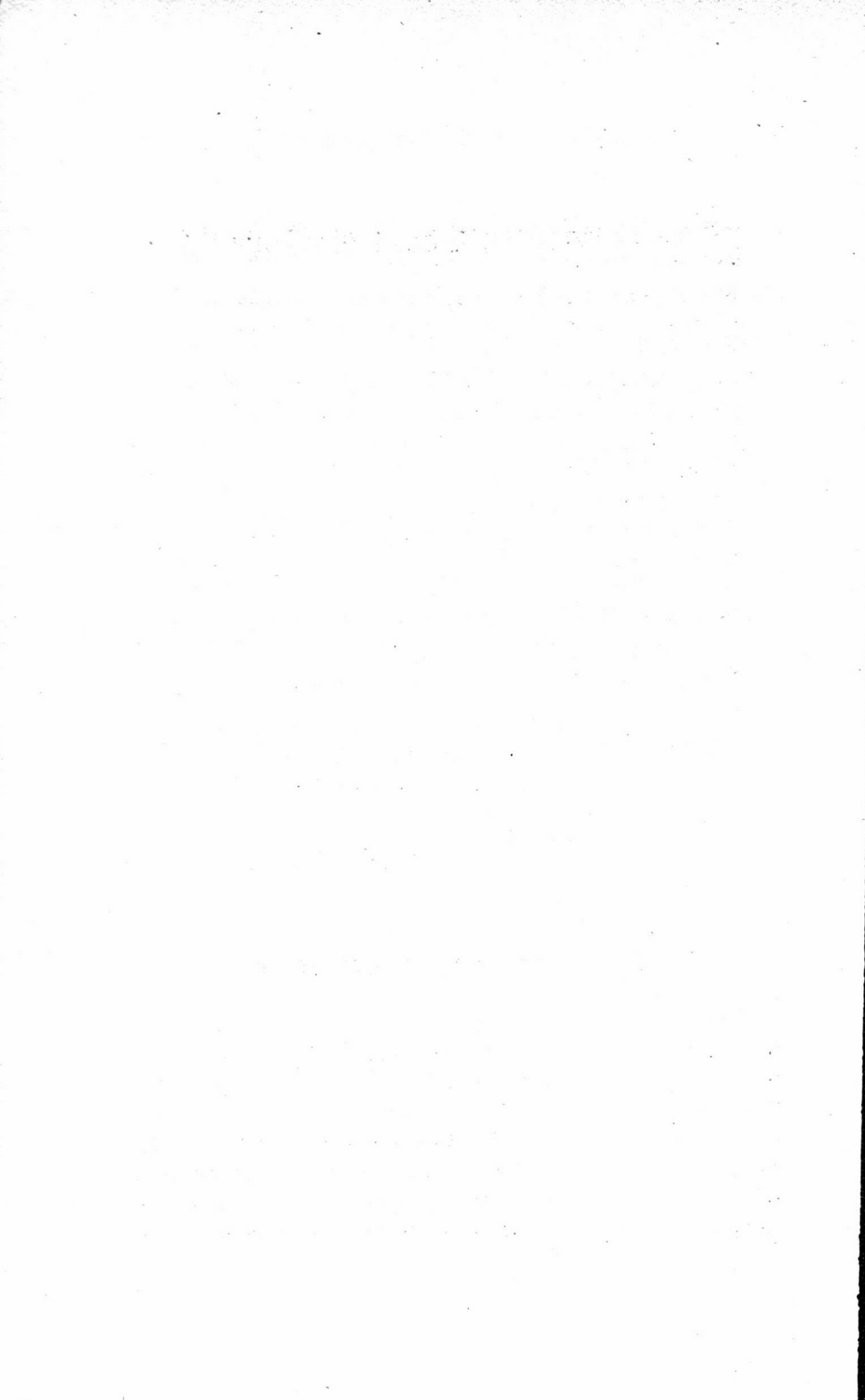
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10035

THE HECHT COMPANY, INC., a Corporation
Appellant,

vs.

BETTY-LYNNE JACOBSEN, an infant by S. ELMER JACOBSEN,
her father, and S. ELMER JACOBSEN,
Appellees.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by the Hecht Company, Inc., a corporation, defendant below, from the judgment of the United States District Court for the District of Columbia. The District Court had jurisdiction under Title 11, Sec. 11-306, D. C. Code, 1940 Ed. This Court has jurisdiction under Title 17, Sec. 17-101, D. C. Code, 1940 Ed. The pleading showing the existence of said jurisdiction is the appellees' complaint (App. 2-5). In order to avoid confusion we ask

the Court to permit us to continue the designation below of the parties herein, i.e. the appellant as defendant and the appellees as plaintiffs.

STATEMENT OF THE CASE

The plaintiff-infant, Betty-Lynne Jacobsen, brought her action to recover damages for personal injuries sustained by her as the result of alleged negligence on the part of the defendant. On November 15, 1945, the plaintiff, then a child of almost four years, accompanied her mother and sister, a child of seven years of age, to the Hecht Company Department Store, which was then and now is owned and operated by the defendant as a business enterprise in the District of Columbia (App. 54). The three visited Santa Claus on the third floor of the store, and, while there, Mrs. Jacobsen purchased several items of clothing (App. 54, 55). Afterwards, they boarded the down escalator to the second floor, the older child going on ahead by herself and the plaintiff standing with her mother (App. 55, 56).

As the mother and the infant plaintiff moved downward on the escalator, the infant plaintiff, a rather impulsive child by the mother's own testimony, wrenched her hand loose from the mother and immediately began to hurry down the moving escalator, weaving in and out between other people also descending on the same escalator, obviously in her eagerness to reach the bottom first. The mother testified that she knew the child was impulsive prior to the time of the accident (App. 56, 73-79, 91). Instead of apprehending the infant plaintiff or calling on other people on the escalator to stop the progress of the child as she moved downwards, the mother merely tried to follow her and then waited. The mother testified that she did not deem it advisable to attempt to stop the child because she feared that such an effort on her part might have caused a

panic even though the immediate steps between her and the other people on the escalator were not occupied, and the escalator as a whole was only moderately filled. (App. 56, 76-78). The mother was not burdened with packages, having only a small box in her arm. The evidence indicates that the mother was in an excellent position to regain hold of the child and prevent her from proceeding down the escalator while it was moving as indicated.

As the infant plaintiff reached the bottom moving step of the escalator, she either sat down or fell in such a manner that she reversed her position as she came to a stop, in that she was facing up the escalator. The child was wearing a garment with a woolen wristlet which became involved with the moving treads where the steps of the escalator break and disappear under the comb plate, with the result that the infant plaintiff's right hand and fingers were caught in the opening. (App. 57-59). The child's fingers were caught near the right hand side of the escalator. The mother testified that she was catapulted out on the floor but got back through the crowd which had gathered, grabbed ahold of the infant plaintiff at almost at the same time the escalator was stopped by means of someone pushing the emergency switch located on the frame. The escalator was stopped in a matter of seconds. (App. 180, 181). The infant plaintiff's hand was released. Her little finger was badly mangled such as to require later amputation and the top of her hand and other fingers were bruised and lacerated. (App. 22-23). The infant child was taken to the hospital room in the store of the defendant where she was treated and immediately sent to the hospital. Later surgery was done on the injured hand. The mother testified that the escalator with which she was familiar because of previous visits to the store, was functioning normally and smoothly on this occasion and that there was nothing in the movements of the escalator that were unusual or in any wise different from its normal operation or function. (App. 76-79). No evidence was introduced in any wise to show

any vibration or jerking in the movements or operation of the escalator such as would cause anyone to fall or be thrown while in transit.

The action was commenced on behalf of the infant child by her father and next friend seeking to recover damages for the child's injuries; the father, likewise, joined as a plaintiff on his own behalf for such injuries as would be incurred by him by virtue of the medicine, hospital or professional care and treatment which the child had required up to the time of the trial or which she would be required to undergo in future.

The pretrial order spells out specific acts of negligence and also relies upon the doctrine of *res ipsa loquitor*. Neither in the pleadings nor in the pretrial order was there any reliance on the doctrine of attractive nuisance so that the case was not tried on that issue. The case came on for trial before a court and jury. Under the ruling of the court, the doctrine of *res ipsa loquitor* and attractive nuisance were specifically ruled out on the evidence (App. 164-166) and the plaintiffs were permitted to prove the specific acts of negligence relied upon, namely that the defendant was guilty of negligence in the construction, maintenance and operation of the escalator. The evidence developed that the escalator upon which the infant plaintiff was injured, was installed by the defendant in 1934. It was purchased by the defendant from the Otis Elevator Company and that at the time of its purchase was the most modern and efficient escalator on the market, and constructed and maintained in various stores, buildings, terminals, not only in the District of Columbia, but throughout the country. It was further established that before the escalator could be installed, it was necessary to have the approval of the Building Inspector's Office of the District of Columbia under the Municipal regulations and the testimony disclosed that in all requirements of the law, and in full compliance with the Building Regulations of the District of Columbia,

the escalator was installed, maintained and operated from the day of its installation. The evidence further disclosed that every year in quarterly periods the escalator was examined by an official inspector of the Building Inspector's Office of the District of Columbia in order to determine that its operation was in compliance with the safety regulations and the code of the Building Inspector's Office and that it did not present any hazard so far as its utility was concerned. Over the objection of defendant's counsel, the plaintiffs were permitted to introduce evidence to show that in 1941 a newer type of escalator was installed by the defendant from the fourth to the seventh floors of their store building. The only apparent difference in the construction of the 1941 escalator from the one on which the infant plaintiff was injured, was in the fact that the corrugation of the moving steps were narrower in the 1941 escalator than they were in the 1934 escalator and that the comb plate into which the steps disappeared were shorter in the finger extensions through which the corrugations moved before disappearing under the floor. (App. 34-37, 50-53, 101, 102, 110, 117, 199, 200). The testimony indicated that although the new escalator was constructed as indicated, and that there was less likelihood of fingers being caught in the event the hand was brought into contact with the moving steps as they approached the comb plate, there was no evidence whatever that the child's hand could not have been caught and injured by the operation of the newer model and the record is complete with testimony to the effect that some opening must be had in the construction of an escalator so as to permit the moving steps to disappear under the comb plate, go under the floor and complete the circuit of mechanical operation. Over the objection of defense counsel, plaintiffs were permitted to introduce photographs of the 1934 and 1941 escalators for the purpose of showing to the jury whatever differences may exist between them. (App. 34, 50, 101, 102) Over the objection of the defense, the plaintiffs' request to have the jury visit the

store of the defendant and compare the two escalators in operation was granted and the jury, in the care of a Deputy Marshal, together with counsel for both parties, and the Trial Judge, visited the store where an inspection of the escalators by the jury was permitted. (App. 199, 200.) Over the objection of the defendant's counsel, the plaintiff was also permitted to introduce evidence of another previous accident occurring in 1941 where an infant child was injured in an accident on the escalator located on the first floor in defendant's store. The evidence disclosed that the last examination by the District of Columbia Building Inspector's Office was on October 26, 1945, some three weeks before the accident, and the escalator was found to be satisfactory in every way, including the safety features. (App. 173, 174). The Inspector who made the inspection testified that he found nothing in the construction, maintenance or operation which would constitute a hazard by the use of the particular escalator and that if he had, it would have been his duty to discontinue its operation until the defect or danger had been remedied. (App. 173, 178, 179). The case was submitted to a jury for its verdict which was returned on behalf of the infant plaintiff in the sum of \$15,000.00 and on behalf of the plaintiff father in the sum of \$2,000.00. The defendant, thereafter, moved for a new trial asserting the points of law to be hereafter argued, including a motion to set aside or order a remittitur on the ground that the damages awarded in view of the injuries, were excessive and not based upon the evidence in the record and that the verdict was the result of sympathy, passion and prejudice. The motion was denied and from the judgment entered on the verdict this appeal is taken.

STATEMENT OF POINTS

1. The Court below erred in holding throughout the trial and in its charge to the jury that the defendant owed to the infant plaintiff the highest degree of care in the

construction, maintenance and operation of the escalator in question.

2. The Court below erred in permitting the plaintiff to introduce any evidence as to the construction, maintenance and operation of the 1941 escalator installed in defendant's store as the question of negligence on the part of defendant, which, in effect permitted the jury to find as a fact that the failure of the defendant to replace the 1934 escalator upon which the infant plaintiff was injured with the newer 1941 model constituted an act of negligence on the part of the defendant and a breach of its duty to an invitee.

3. The Court below erred in not holding that the negligence of the infant plaintiff's mother in the manner in which she exercised control and supervision over the child while on the escalator was the proximate cause of the child's injuries as a matter of law and in not permitting a verdict for the defendant on this defense.

4. The Court erred in permitting evidence of a previous accident since the type of accident disclosed by the proof was different from that suffered by the infant plaintiff in this case.

5. The Court erred in not granting a motion for new trial or in the alternative ordering a remittitur of both plaintiffs' judgments on the ground that the verdict of the jury was contrary to the evidence and was based upon passion, prejudice and sympathy.

SUMMARY OF ARGUMENT

1. The defendant did not owe to the plaintiffs the highest degree of care but on the other hand owed only the duty of reasonable care in the construction, maintenance and operation of the escalator upon which the infant plaintiff

was riding. Being at most a private carrier of passengers, the defendant should not be held to the highest standard of care such as is imposed upon common carriers. There is no sufficient reason for making the maintenance and operation of escalators an exception to the well established rule that owners of department stores owe their customers but ordinary and reasonable care.

2. Whether the defendant owed either the highest degree of care or on the other hand only ordinary and reasonable care to the plaintiffs, it was error on the part of the Trial Court to permit evidence to be submitted to the jury indicating that the defendant, in order to avoid a finding of negligence by the jury was obliged to replace the 1934 escalator with a later model. Even if the defendant were under such an obligation, its failure to do so was not enough to establish negligence and certainly was not the proximate cause of the accident. The plaintiffs failed to introduce sufficient evidence to establish as a fact that the 1941 model escalator was safer for a child of the infant plaintiff's age, size and temperament or that a child moving down the escalator as the infant child in this case did, would not have its fingers caught between the comb plate and the steps of any later model which might have been installed.

3. The infant plaintiff's mother, having testified that she was familiar with the escalator in defendant's store because of previous visits, and that at the time of the accident it was functioning normally and smoothly and, knowing beforehand that the infant child was impulsive it was incumbent upon her to exercise proper care and supervision over the infant child while descending on the escalator. As the record discloses clearly, she made no effort to do so and therefore it is the contention of the defendant that the proximate cause of this accident, unrelated to any negligence which may have been established against the defendant, was the failure of the infant plaintiff's mother to

control properly the movements and safety of her child and that the defendant should have had a directed verdict as a matter of law on this point.

4. It was error for the Trial Court to have permitted evidence of a previous accident on the escalator located between the first and second floor of defendant's store since there was no proof that the accidents were similar as to cause, or events.

5. The Court below should have granted a new trial or in the alternative ordered a remittitur because the damages are excessive, not consistent with the evidence and obviously awarded as a result of sympathy, passion and prejudice.

ARGUMENT

I

1. **The Defendant Did Not Owe to the Plaintiffs the Highest Degree of Care But on the Other Hand Owed Only the duty of Reasonable Care in the Construction, Maintenance and Operation of the Escalator Upon Which the Infant Plaintiff Was Riding. Being at Most a Private Carrier of Passengers, the Defendant Should Not Be Held to the Highest Standard of Care Such as Is Imposed Upon Common Carriers. There Is No Sufficient Reason for Making the Maintenance and Operation of Escalators an Exception to the Well Established Rule That Owners of Department Stores Owe Their Customers But Ordinary and Reasonable Care.**

The lower Court, likening an escalator to an elevator, ruled on the authority of *Munsey v. Webb*, 37 App. D. C. 185, 287 F. 62, that the defendant in the construction, maintenance, and operation of the escalator in question owed the plaintiff-infant the highest degree of care (App. 12, 43, 44, 100). In the *Munsey* case this Court remarked: "The elevators are an essential part of the

building and persons using them do so by the invitation of the defendant. It follows, therefore, that the defendant in this instance is a carrier engaged in the transportation of passengers. While not, in the strict sense, an insurer, he is required to exercise the highest degree of care and diligence for the safety of persons using his elevators as agencies of transportation." The *Munsey* case was affirmed by the United States Supreme Court in *Webb v. Munsey*, 231 U. S. 150, 58 L. Ed. 162. It is to be noted, however, that the Supreme Court did not consider the standard of care owed to free-riding elevator passengers, but decided the case solely on the issue of proximate cause. This Court reaffirmed the standard of care allegedly established in the *Munsey* case in *Goldenberg Co., Inc. v. Schicht*, 65 App. D. C. 336, 83 F. 2d 593, and *McKay v. Parkwood Owners*, 78 U. S. App. D. C. 260, 139 F. 2d 385. It is conceded that escalators are sufficiently analogous to elevators in general character and purpose to justify the application to their construction, operation, and maintenance of the same standard of care as that applied to elevators.

It is our contention, however, that, if the statement from the *Munsey* case quoted above established a rule of law and was not mere dictum, as Justice Stephens contended in his dissent in the *Goldenberg* case, *supra*, then this Court ought to reverse itself and establish a standard of care for the operators of free elevators and escalators, particularly in department stores, which will reflect more accurately the law of negligence and will be more in harmony with the facts. The *Munsey* case would hold the private carriers of escalator and elevator passengers to the same standard of care, i. e. the highest, that the law imposes upon common carriers. Yet, as this Court ruled in *Southern Ry. Co. v. Taylor*, 57 App. D. C. 21, 27, 16 F. 2d 517, cert den. 273 U. S. 767, 71 L. Ed. 882, "... a common carrier is a public utility, a public servant required to extend its services to all who request it, providing they place themselves within the lawful rules and regulations govern-

ing its use and operation. It logically follows that the operator of an elevator in an office building is not a common carrier, nor is he engaged in commerce. He is not required to carry all who may demand passage. The matter of extending service is entirely within his control. The elevator is merely an instrumentality furnished for the convenience of those who occupy and use the building, at all times within the control of the owner." The *Southern* case was reaffirmed in *Woodward & Lothrop v. Lineberry*, 60 App. D. C. 164, 50 F. 2d 314 (cert. den. 284 U. S., 76 L. Ed. 552).

Since elevator operators and, by analogy, escalator operators are not common carriers of passengers, they ought not to be held to the duties and obligations of a common carrier, but, at most, to those of a private carrier. The law imposes upon common carriers the highest degree of care both because of their peculiar position and because of their function. A common carrier occupies a position of public trust which it has attained and holds through a license or franchise, monopolistic in purpose and provisions. To protect the common carrier the public foregoes the protection which open competition gives. If all could be common carriers, the careless would quickly be eliminated by the forces of competition. Because the public is, as it were, at the "mercy" of the common carriers, the law correctly requires of them the highest degree of care. Another reason for so doing is because common carriers hold themselves out to carry passengers safely. They engage specifically in the transportation of passengers whose safety they assume to protect. The law implies a contract between the common carrier and its passengers to exercise the highest degree of diligence and care in transporting them, the consideration for which is the fare paid. Because of this inequality between common carriers and their passengers, and the compulsion under which the latter are to travel in common conveyances, common carriers are not allowed by law to abandon or limit by notice or stipulation the high degree of care which they owe their passengers. Cf. *New York Central R. Co. v. Lockwood*, 84 U. S. 357, 21

L. Ed. 627; *Wiley v. Grand Trunk Ry. of Canada*, 227 F. 127 (D C. N. Y.). On the other hand, the law imposes upon private carriers only an ordinary or reasonable degree of care. Thus, the United States Supreme Court in *Shoemaker et al. v. Kingsbury*, 79 U. S. 369, 376-378, 20 L. Ed. 432, ruled that a private carrier (train for logging camp) for hire was not under the same obligations and responsibilities which attach to common carriers. It held the defendant only to "the exercise of such care and skill in the management and running of the train as prudent and cautious men, experienced in that business, are accustomed to use under similar circumstances." See also *Gornstein v. Priver*, 64 Cal. App. 249, 221 P. 396; *Duffy v. J. W. Bishop Co.*, 99 Conn. 573, 122 A. 121; *McClure v. Johnson*, 50 Ariz. 76, 69 P. 2d 573. The law, moreover, will permit private carriers for hire and common carriers acting in the capacity of a private carrier to stipulate against or limit liability for injury to passengers caused by their negligence. See *McCree v. Davis*, 280 F. 959; *Sassaman v. Pennsylvania R. Co.*, 144 F. 2d 950; *Charleston & W. C. R. Co. v. Thompson*, 234 U. S. 576, 58 L. Ed. 1476.

The considerations which move the law to require the highest degree of care from common carriers of passengers are not present in the case of escalator operators such as the defendant. They have no contract of hire with the riders, upon which the passenger-carrier relationship fundamentally rests. They have no franchise giving them monopolistic privileges and burdening them with the obligations to the public which such entail. They offer their invitees a free service, which they may interrupt, or curtail, or terminate without notice or liability. Moreover, escalator operators may by suitable notice or stipulation disclaim all liability for injuries to persons carried, even though such result from the operators' negligence. See *Clarke v. Ames*, 165 N. E. 696, 697-698, 267 Mass. 44. These are the criteria and the characteristics of a private carrier. Hence, if this Court views the defendant in its correct legal class, i. e. a private carrier for free, it is inescapable that

the defendant can be held to only an ordinary standard of care. This is true, even if we concede, *arguendo*, that a carrier-passenger relationship did exist between the defendant and the plaintiff, infant, despite the absence of a charge, on the basis of a benefit accruable to the defendant from the use of its escalator by the plaintiff's mother in the purchase of clothing for her. The status, rather than the charge, of a carrier ultimately determines its liability. Common carriers, apart from a special contract, owe the highest degree of care to non-revenue passengers. See *In Re California Nav. and Imp. Co.*, 110 F. 670 (D. C. Cal.). Such is not true of private carriers. See *supra*.

It may be argued that, apart from the status of common or private carrier, public policy requires that department stores and others operating elevators and escalators be held to the highest degree of care because they are transporting people by mechanical means. Many jurisdictions hold this view. But, other jurisdictions more worthy of consideration by this Court hold that department stores and other private operators of elevators and escalators owe only ordinary and reasonable care to the persons transported. Thus, the Court of Appeals of New York in *Griffen v. Manice*, 59 N. E. 925, 928-929, 166 N. Y. 188, declared:

The next exception of the appellant relates to the degree of care which the learned trial court instructed the jury the defendant [the owner of an office building operating a passenger elevator] was bound to exercise. The court charged: "As to the machinery and appliances by which an elevator is moved and controlled in its ascent and descent, an owner is bound to use the utmost care as to any defect which would be liable to occasion great danger or loss of life, and he is in that respect subject to the same rule that applies to a railroad company in regard to its roadbed, engine, and other similar machinery. Now, the rule that is applicable to a railroad company, as to its roadbed, engine, and machinery, is that they are bound to exercise the utmost care and diligence, and are liable for the slightest neglect against which human prudence

and foresight might have guarded." * * * In determining the correctness of the rule of liability laid down by the trial court, the relation of the parties, which I think not controlling on the application of *res ipsa loquitur*, is of vital importance. Doubtless no distinction can be drawn between vertical transportation and horizontal transportation or transportation along the surface of the earth. If the relationship between the parties and the character of the carrier are the same in both cases, there is no reason why the same measure of diligence should not be exacted in one case as in the other. But the defendant was not a common carrier, and received no compensation, at least directly, for carrying persons from one floor to another. The right of any person to be carried in the elevator was based on the implied invitation to enter, which the defendant, as the owner of the property, is deemed to have extended to all who might have business on the premises. To such persons the law imposed upon the occupant or owner the duty of seeing that the premises were in a reasonably safe condition for access and entering. * * * But "the measure of his duty was reasonable prudence and care". *Larkin v. O'Neil*, 119 N. Y. 221, 23 N. E. 563; *Hart v. Grennell*, 122 N. Y. 371, 25 N. E. 354. If the charge of the trial court is to be sustained, we must hold that the maintenance and operation of an elevator form an exception to the general standard of care imposed upon the owners and occupants of real property. We see no reason for making this exception. The operation of an elevator, no doubt, involves danger, and, if accident occurs, it may result in most serious consequences. It is not, however, the only dangerous appliance used in modern buildings. The boiler which furnishes steam heat, the conductors through which electric light is furnished, may at times be the cause of serious accidents. An open hatchway is equally dangerous. Yet it has never been attempted to impose upon the owner of a building any greater responsibility as to these matters than that of exercising reasonable care. It is very probable that, in the advance of the mechanical art, many new appliances will be introduced into buildings which will involve danger. It seems to me impracticable to dis-

tinguish as to the measure of the owner's duty between these appliances and that such an attempt would involve great confusion in the law. I do not wish to be misunderstood. In the exercise of the same degree of care, different degrees of precaution may be necessary. The same man, with equal prudence, will leave an article of furniture unguarded in his house, and carefully secrete or lock up jewelry or money. So, the more dangerous an appliance may be, the more attention may be requisite. If the fair purport of the charge of the court was only that the care should be commensurate with the danger, it might not be objectionable. The charge, however, goes far beyond this. The utmost human care and foresight would require the owner of a building to use the most modern and improved form of elevator, the latest successful mechanical device, and the most skillful operators. Such is the rule in the operation of railroads, and this degree may well be required, where, for a consideration, there is a contract to carry safely. But common knowledge informs us that such a rule would be unreasonable, applied to elevators in ordinary buildings. There are elevators not only in great office buildings and hotels, but also in small buildings and even in many private homes. Where there is little traffic the duty of operating the elevator is at times imposed on an employe or servant with other work to perform. To require in all cases (and I do not see how it is possible to distinguish between them on the law) the same measure of duty that is imposed on a railroad company or common carrier would be going too far. I think sufficient security is afforded the public when the owners or occupants of a building are required to use reasonable care in the character of the appliance they provide, and in its maintenance and operation. The stairways are always open to those who deem this degree of diligence inadequate for their protection. The charge of the learned trial court was therefore erroneous.

See also *Sciolaro v. Asch*, 198 N. Y. 77, 91 N. E. 263, 264; *Rumetsch v. John Wanamaker, New York, Inc.*, 110 N. E. 760, 761-762, 216 N. Y. 379; *Cockfield v. Mays Furs & Ready to Wear*, 59 N. Y. S. 2d 744, aff. 59 N. Y. S. 2d

624, 269 App. Div. 1043; and *Glennon v. James McCreery & Co.*, 67 N. Y. S. 2d 818, 271 App. Div. 977.

The Supreme Court of Errors of Connecticut in *Stratton v. J. J. Newberry Co.*, 169 A. 56, 57-58, 117 Conn. 522, declared:

The apellant claims . . . that the court should have informed the jury that in the maintenance and operation of the escalator the defendant (department store) was required to exercise the highest degree of care and should have defined that term, the claim being, in brief, that the jury should have been instructed that a standard of care should have been used by the defendant in the maintenance and operation of its escalator such as is required of a common carrier of passengers. * * *

In this state we have uniformly held that the standard of care required by the law to be exercised by the owner of premises toward an invitee thereon is that of reasonable care. * * * In operating its escalator for the convenience of its customers, the defendant was not a common carrier of passengers for the reason pointed out by Holmes, C. J., in *Seaver v. Bradley*, 179 Mass. 329, 330, 60 N. E. 795, 88 Am. St. Rept. 384, that it could have refused to carry the plaintiff without incurring any liability to her. * * * Indeed, to sustain the rule invoked by the apellant would result in one standard of conduct being required of the owner in respect of one instrumentality in a building and a different standard for another; in other words, if the plaintiff had elected to go upstairs by the staircase, a different standard of duty would have been imposed upon the defendant than if she had decided to ascend by the escalator or elevator; and the operation of an escalator would thus constitute an exception to the general standard of duty imposed by the law upon the owners and occupants of real property to those invited to enter for the purposes of business. We see no reason for making this exception.

In *Firtz v. Capitol Park Realty Co.*, 98 Conn. 627, 635, 120 A. 300, 29 A. L. R. 17, the defendant, proprietor of an amusement park, operated an "aeroplane swing" consisting of boats suspended in the air

and revolving rapidly by machinery around a central pillar. Those riding in the apparatus were required to pay a fee. The plaintiff, having paid the usual charge, was injured by the falling to the ground of the boat in which she was riding owing to the breakage of the rods by which it was suspended. We held that the defendant was not bound to exercise toward the plaintiff the high degree of care required of a common carrier, but rather that the relation of the plaintiff was that of an invitee for whose protection the defendant was bound to exercise the care of an ordinary prudent person under the circumstances. In this connection we said (page 635 of 98 Conn., 120 A. 300, 303):

“One traveling upon his lawful occasions must perforce use the ordinary means of transportation, and is practically compelled to place himself in the care of carriers of passengers, and so the rule applied to carriers holds them to the highest degree of care and diligence. On the other hand, one desiring for his delectation to make use of pleasure-giving devices similar to the one in question is under no impulsion of business or personal necessity. He is seeking entertainment, and, when invited by manager to avail himself of the equipment provided by certain forms of amusement, he can properly ask only that he be not exposed by the carelessness of those in charge of any given instrumentality to harm preventable by care appropriate to the operation of such instrumentality”.

The principle enunciated in this decision is controlling in the instant case. The charge of the trial court was in accord with this principle.

The Supreme Court of Rhode Island in *Edwards v. Manufacturers Bldg. Co.*, 61 A. 646, 646-647, 27 R. I. 248, declared:

A landlord who maintains an elevator in his private building is not a common carrier. . . . And it seems to us unreasonable to say that such a landlord is to be held to the same degree of care which the law

imposes upon a common carrier. * * * It is true that whether a common carrier operates a stagecoach, a railway on the surface of the ground, or a railway up the mountain side, the law subjects him to a certain rule of responsibility; but the rule is imposed not on account of the danger of the journey, but because of his relation to the public. If a private person transports a friend in his coach or in his automobile, he is liable only for want of ordinary care, though the danger may be the same as in traveling by public coach or by railway. The duty of a landlord towards those who enter his premises by implied invitation is to exercise reasonable care for their safety, and we see no reason for modifying the rule when he introduces and operates an elevator.

See also *Potemkin v. Leach*, 65 R. I. 1, 13 A. 2d 250. The courts of Massachusetts also hold that a department store in operating an escalator or elevator is required to exercise not the highest but only ordinary and reasonable care. See *Draper v. Cotting*, 231 Mass. 51, 120 N. E. 365; *Bourgo v. White*, 159 Mass. 261, 34 N. E. 191; *Seaver v. Bradley*, 179 Mass. 329, 60 N. E. 795; and *Clarke v. Ames*, *supra*. The same is true of New Jersey. See *Richter v. L. Bamberger & Co.*, 11 N. J. Misc. 729, 165 A. 289, 291.

The rule of New York, New Jersey, Rhode Island, Connecticut, and Massachusetts that in the construction, operation, and maintenance of escalators and elevators department stores are held not to the highest but to an ordinary and reasonable standard of care should, we respectfully urge, be adopted by this jurisdiction. It is in full accord with the recognized status of escalator and elevator operators as private rather than common carriers; whereas the rule of other jurisdictions is patently inconsistent in holding such operators to the standard of common carriers for purposes of liability in negligence cases while denying them that status for all other purposes. Moreover, the New York rule is realistic in that it refuses to make escalators and elevators operate an exception to the universally accepted rule that department

stores owe only ordinary and reasonable care to invitees in the construction, maintenance, and operation of the premises. In light of the numerous mechanical devices presently in a modern store, it is an anachronism to consider an escalator or elevator so different in terms of possible dangers as to require a separate standard of care.

Furthermore, the rule that escalator and elevator operators must exercise the highest degree of care is based upon a fallacious analogy. The rationale of the rule is that the law requires those, such as the railroads, motor carriers, and airlines, who offer to transport the public to exercise the highest degree of care; escalator and elevator operators offer to transport the public; therefore, the law requires them to exercise the highest degree of care. The fallacy lies in the failure to recognize that the law fundamentally holds rail, motor, and air carriers to the highest degree of care not because they transport the public by mechanical devices but because they transport them so as common carriers. When the same railroad lines, bus companies, and air lines, transport people by the same mechanical means as private carriers, the law does not demand of them the highest standard of care, *supra*. Escalator and elevator operators do not transport people as common but as private carriers, *supra*. Therefore, it is erroneous to hold them to the same degree of care as common carriers, which are compensated for that burden by the monopolistic privileges and protection enjoyed.

II.

2. **Whether the Defendant Owed Either the Highest Degree of Care or on the Other Hand Only Ordinary and Reasonable Care to the Plaintiffs, It Was Error on the Part of the Trial Court to Permit Evidence to Be Submitted to the Jury Indicating That the Defendant, in Order to Avoid a Finding of Negligence by the Jury Was Obligated to Replace the 1934 Escalator With a**

Later Model. Even if the Defendant Were Under Such an Obligation, Its Failure to Do So Was Not Enough to Establish Negligence and Certainly Was Not the Proximate Cause of the Accident. The Plaintiffs' Failure to Introduce Sufficient Evidence to Establish as a Fact That the 1941 Model Escalator Was Safer for a Child of the Infant Plaintiff's Age, Size and Temperament or That a Child Moving Down the Escalator as the Infant Child in This Case Did, would Not Have Its Fingers Caught Between the Comb Plate and the Steps of Any Later Model Which Might Have Been Installed.

Prior to the time of the accident the defendant had replaced certain of its escalators with a 1941 model. It had not, however, replaced the escalator in question, which was a 1934 model (App. 37, 92-94, 98, 101). The plaintiff sought to establish that this omission on the part of the defendant constituted negligence. To that end the court allowed the introduction of evidence allegedly showing the difference between the 1934 and the 1941 escalators, and permitted the jury to consider the said omission in determining the issue of negligence. (App. 34-37, 50-53, 101, 102, 199, 200).

Now, if, as we have heretofore contended, the defendant owed the plaintiff-infant only reasonable and ordinary care, the omission by the defendant to have replaced the escalator in question with the later model was not, in light of the record herein, a proper consideration for the jury. The defendant was under no obligation to the plaintiff-infant to have replaced the escalator in question with a later model. The undisputed testimony shows that the said escalator when installed in 1934 was safe in every respect judged by the standards of the time, that the said escalator when the accident occurred in 1945 was safe in terms of construction, maintenance, and operation judged by the common and ordinary practice of escalator operators at the time, and that between 1934 and 1945 the said escalator had been frequently inspected and carefully

maintained (App. 103, 104, 108, 109, 112, 114, 115, 168-175, 178, 179). There is not a scintilla of evidence that an escalator operator of ordinary and reasonable care would not have operated an escalator of the same construction as that in question or in the same way as did the defendant. Thus, the defendant met fully the standard of ordinary and reasonable care required and expected of him. An escalator operator exercising ordinary and reasonable care is not required to adopt the safest equipment and devices available but only such as his standard of care would require. See *Draper v. Cotting, supra*.

It was, therefore, manifestly erroneous for the trial court to have admitted evidence as to the failure of the defendant to replace the escalator in question with a later model and to have allowed the jury to consider this omission in determining the issue of negligence. The court thereby allowed the jury to hold the defendant to a duty not required or expected of an escalator operator of ordinary and reasonable care. In effect, the jury held the defendant to the highest degree of care, which, as previously indicated, is not properly applicable to the defendant. Since the defendant owed no duty to the plaintiff-infant to supply the most modern equipment or the safest available but only such equipment as a person of reasonable and ordinary care would supply, it was manifest error to have allowed the jury to determine whether the defendant was negligent in not doing so.

Even, if we were to concede, *arguendo*, that the defendant was held to the highest degree of care, and, hence, was required to use the safest equipment and devices reasonably available, yet, the omission by the defendant to have replaced the escalator in question with a later model was not a proper consideration for the jury. The plaintiff failed completely to establish that the said omission was negligence on the part of the defendant or that it was the proximate cause of the plaintiff-infant's injury. Before the defendant could be held liable, even under the rule of

the highest degree of care, for the said omission, the plaintiffs would have had to establish (a) that a person exercising the highest degree of care would have replaced the 1934 escalator with the 1941 model, otherwise the defendant would have had no duty to do so, and (b) that the failure to do so was the proximate cause of the accident, otherwise the defendant's negligence would not have been the cause of the plaintiff-infant's injuries. "A (common) carrier is not required to adopt and use every new and untried machine or appliance, or the best in use but which is not in general use"—13 C. J. S. "Carriers", sec. 738. See also, *Central of Georgia R. Co. v. Robertson*, 83 So. 102, 203 Ala. 358; *Riley v. L. & N. R. Co.*, 21 S. W. 2d 990, 231 Ky. 564; *E. H. Koester Bakery Co. v. Poller, et al.*, 50 A. 2d 234; and *Leach v. School District No. 322 of Thurston Co.*, 85 P. 2d 666, 197 Wash. 384. "If the cars and appliances adopted by [a common carrier] are of the most approved type in general use by others engaged in a similar occupation, its duty in this respect is sufficiently performed."—13 C. J. S. "Carriers", sec. 741. "While the owner [elevator or escalator operator] is not bound to furnish an appliance which will make accidents impossible, and is only bound to furnish those actually used by men of judgment and common prudence, he must make use of the best and most approved machinery and devices in general practical use (emphasis supplied)—13 C. J. S. "Carriers", sec. 742. See also *Marovich v. Central Calif. Traction Co.*, 216 P. 595, 598, 191 Cal. 295, and *Wilson v. Public Service Co-ordinated Transport*, 20 A. 2d 368, 126 N. J. L. 250.

It is to be noted, forthwith, that the record herein is entirely void of any evidence that the 1941 escalator was "known to practical men", or was "in general practical use", or "had been tested by practical use". The plaintiffs called no witnesses to testify, introduced no statistics to prove, and cited no instances to illustrate that the 1941 escalator had been adopted by other escalator operators

or that the 1934 escalator had been replaced by them in the exercise of the highest degree of care. On the basis of the record the jury could properly conclude only that the 1941 model escalator was "a speculative and untried experiment". That the defendant had chosen to replace some of the 1934 escalators with the 1941 model is not conclusive of the issue. For all the record shows, the defendant may have been paying the price of pioneering and may have in the 1941 model installed an escalator less safe than the 1934 model. The mere fact that one escalator is a later model than another proves nothing in terms of safety factors. Until the plaintiffs had established that a person exercising the highest degree of care would have replaced the escalator in question with the 1941 model, how could the jury properly consider whether the defendant was negligent in failing to do so. A duty must be shown before a jury can find whether or not it has been violated. There is no evidence to show that it was the defendant's duty to have replaced the 1934 escalator with the 1941 model, because the record is silent as to whether the 1941 model was "the most approved type in general use by others engaged in a similar occupation", and until such duty was shown the defendant could not be found negligent in failing to do so.

The record herein is also void of any credible evidence that the 1941 model escalator was safer for the plaintiff-infant, in view of her age, size, and temperament, than the 1934 model in question. There is evidence that the apertures between the treads on the steps and between the steps and the comb plate, where the plaintiff-infant's right hand was caught, are smaller in the 1941 model than in the 1934 model (App. 102-107). There is, on the other hand, proof that an opening between the steps and the comb plate still exists in the 1941 model, and functions in the same way as in the 1934 model, and that, in fact, an escalator cannot presently be built without such an opening (App. 110, 111, 112, 117) Since the pictures of the two

models are still shots (App. 52), they cannot establish whether the opening in the 1941 model would not have readily caught the plaintiff-infant's hand as did the 1934 escalator. The same objection is true of the inspection by the jury of the two models, for the jury lacked the knowledge and the experience necessary to answer the question of the relative safety of the two models in terms of the plaintiff-infant.

Since the 1941 model has smaller apertures, one may concede that in general it is safer than the 1934 model. But this fact does not prove that the 1941 model was safer for the plaintiff-infant or that the defendant's failure to install it was the proximate cause of the plaintiff-infant's injuries. The key fact is not how smaller were the 1941 apertures but whether they were small enough reasonably to lessen or eliminate the likelihood of the plaintiff-infant's injuries. Could a child of the plaintiff-infant's age, size, and temperament have as readily injured her right hand in the opening between the steps and the comb-plate on the 1941 model as on the 1934 model? If the answer is yes, then it is obvious that the failure of the defendant to change the models has no bearing on this case. There is no credible evidence to the contrary. To illustrate our point: Let us presume that the 1941 model had the same size apertures as did the 1934 model, but that the former had a stronger frame and, hence, was safer in general. One would then immediately agree that it would be immaterial to this case whether the defendant had or had not been negligent in failing to install the 1941 model. Since there is no evidence in this case to link the defendant's failure to install a 1941 model escalator to the injuries of the plaintiff-infant, the jury could not properly consider the defendant's failure to do so.

III

3. **The Infant Plaintiff's Mother, having Testified That She Was Familiar With the Escalator in Defendant's Store Because of Previous Visits, and That at the Time of the Accident It Was Functioning Normally and Smoothly and, Knowing Beforehand That the Infant Child Was Impulsive It Was Incumbent Upon Her to Exercise Proper Care and Supervision Over the Infant Child While Descending on the Escalator. As the Record Discloses Clearly, She Made No Effort to Do So and Therefore It Is the Contention of the Defendant That the Proximate Cause of This Accident, Unrelated to Any Negligence Which May Have Been Established Against the Defendant, Was the Failure of the Infant Plaintiff's Mother to Properly Control the Movements and Safety of Her Child and That the Defendant Should Have Had a Directed Verdict as a Matter of Law on This Point.**

It was the contention of the defendant below, and we argue earnestly here, that the proximate cause of the infant plaintiff's injuries was the neglect of the mother in not keeping the infant plaintiff under proper control and supervision while descending on the escalator. We believe that the evidence is so clear on this point that there was nothing upon which there could be a conflict of opinion in the minds of the jurors and therefore there was no issue of fact to be settled but, on the other hand the testimony was so clear and convincing that it was incumbent upon the Trial Court to hold as a matter of law that the proximate cause was the result of the mother's neglect and therefore the defendant was entitled to a directed verdict.

It is to be noted that the plaintiffs did not introduce one iota of evidence to show negligence on the part of the defendant in installing the 1934 escalator. On the other hand the defendant established by creditable and uncontroverted proof that at the time of the installation

the escalator was purchased from a reliable manufacturer and, that it was of safe and standard construction and design and its use was common for the purpose indicated (App. 103, 108, 112, 169-170), and that before being placed in operation the escalator had been checked and approved by the Municipal Authorities of the District of Columbia (App. 108, 109, 169-172). The plaintiffs also failed to introduce even a scintilla of evidence to show negligence on the part of defendant in inspecting or maintaining the said escalator. On the other hand the defendant proved by abundant and undenied testimony that the escalator had been carefully inspected quarterly by the Building Inspector's Office of the District of Columbia, even as late as three weeks before the accident, and that it was frequently inspected by the defendant's own employees; that the inspection by the Building Inspector as well as by the store employees did not disclose any defect or condition dangerous to the infant plaintiff's safety or, considered dangerous by escalator operators exercising even the highest degree of care and that the escalator had at all times been properly operated and maintained (App. 104, 114, 115, 168, 169-170). We emphasize again, that by the testimony of the infant plaintiff's mother, it was established that at the time of the accident the escalator was moving smoothly and functioning properly, which fact eliminates the possibility that there was any defect in the operation of the escalator such as would or did cause the infant plaintiff to fall or lose her balance (App. 76-79). Thus, had it not been for the mother's failure to control the child while on this moving mechanical apparatus, it is clear that no injury would have occurred to the infant plaintiff. (App. 74, 76-77) The evidence is clear that even after the child impulsively broke away from the mother while descending on the escalator, the mother had ample time to reach out and control the child or at least follow it down the moving stairs before the child had reached other persons descending on the same escalator and then weaving in and out between these persons in such a way as to cause the

child to ultimately fall and become injured. (App. 54, 56, 72, 73, 79, 91). We argued below and seriously contend here that the mother had it within her power to call to the adult persons on the escalator to prevent the child from weaving in and out between them and thus prevent the accident. The evidence discloses that the child broke away from the mother practically at the top step and that there were approximately seventeen (17) steps for the child to descend before reaching the bottom (App. 56, 75-78); certainly there was sufficient time for the mother, acting as a reasonable and prudent person would have acted under the circumstances, to have prevented this accident. This is not the case of an attractive nuisance where a child wanders off, becomes attracted to a dangerous piece of machinery, all to its injury, nor is it a case of *res ipsa loquitor* as the Court ruled where an accident itself warrants the inference of negligence. It is a comparatively simple case of a small young and impulsive child being allowed by its mother to practically run down a moving escalator and then, when near the bottom, to fall or sit down on the comb plate and have its fingers become involved in the disappearing steps. This we believe, under the authorities, to have been the real cause of the accident. This Court in *S. S. Kresge Co. v. Kenney*, 66 U. S. App. D. C., 86 F. 2d 651 says: "The proximate cause of an injury is that cause which, in natural and continuous sequence unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." Nor is there any "succession of events so connected as to make an entire whole without any new intervening cause", as pointed out by this Court in *Howard v. Swagart*, reported in 82 U. S. App. D. C. 147, 151, 161 F. 2d 651, which distinguishes *Munsey v. Webb*, *supra*.

Counsel for the defendant also asked the Court below for a directed verdict on this point so far as any recovery by the adult plaintiff on the ground that the mother's negligence, *supra*, as a matter of law, was clearly the proximate cause of the infant's injuries and therefore the

parents' right to recovery was barred. This the Court refused to do but submitted that question to the jury as an issue of fact. It is our position that the Court erred in that respect because it is well established that the contributory negligence of a child's custodian, here the mother, bars recovery by the child's parents. *Conway v. Monidah Trust*, 155 P. 178, 52 Mont. 244; *Monge v. New Orleans Ry. and Light Co.*, 82 So. 397, 145 La. 435; *Ward v. Southern Penn. Traction Co.*, 80 Pa. Supr. 394. See particularly the case of *Connelly v. Kaufman and Baer Co.*, 37 A. 2d 125, 349 Pa. 261 (where mother's contributory negligence in caring for an infant child when he was injured on an escalator like in this case, barred father's recovery for such injury). This is true even where the defendant, being a common carrier, is charged with the highest degree of care. *Shadwick v. Hills*, 69 N. E. 2d 197, 790 A. 143.

IV.

It Was Error for the Trial Court to Have Permitted Evidence of a Previous Accident on the Escalator Located Between the First and Second Floor of Defendant's Store Since There Was No Proof That the Accidents Were Similar as to Cause, or Events.

Counsel for the plaintiff, over objection of the defendants, was permitted to introduce evidence of prior accidents in defendant's store involving the escalators and particularly the one by the witness, Beals, which occurred in the fall of 1938 and which involved the escalator from the main floor to the first floor in defendant's store (App. 120) and relied upon the case of *Meyers v. Capital Transit Co.*, 75 U. S. App. D. C. 257, 126 Fed. 2d 323. Our objection then and now to the admissibility of this evidence was based upon the fact that in order to show evidence of prior accidents, such evidence would have to indicate that the conditions at the time of the latter accident were identical with those conditions existing at the time of the former accident. The testimony of the witness Beals indicated clearly that the prior accident occurred under differ-

ent conditions and by reason of different circumstances than the case at bar and therefore it was error for the Court to have permitted such evidence because of its prejudicial effect upon the jury.

V.

The Court Below Should Have Granted a New Trial or in the Alternative Ordered a Remittitur Because the Damages Are Excessive, Not Consistent With the Evidence and Obviously Awarded as a Result of Sympathy, Passion and Prejudice.

It is our contention that the damages awarded to both plaintiffs in this case were excessive, not consistent with the evidence in the case and are clearly the result of sympathy, passion and prejudice. In the case of the adult plaintiff, the medical expenses and other incidental expenses proved, as well as those alleged likely to occur in the future, do not justify the sum allowed to the plaintiff father. So far as the child's injury is concerned, there is no doubt that the child lost her little finger on her right hand and that she had a visible keloid scar across the right wrist. The medical testimony indicated every reasonable likelihood that this scar could be removed by plastic surgery. The jury were permitted to pass upon the "psychological" injury to the child without any evidence to sustain such a contention. To allow the verdict of the jury in favor of the infant plaintiff in the sum of \$15,000.00 to stand, is to do manifest injustice under the evidence in this case. On the motion for new trial, we asked the Court below to either grant a new trial on the ground that the verdict was excessive or in the alternative order a remittitur to make the verdict commensurate with a fair and reasonable amount for compensation which the court refused to do. With candor, we are quite familiar with the rule of this Court that it will not ordinarily disturb the verdicts in the Trial Court on the theory that this is a matter more or less within the discretion of the Trial

Court; however, we respectfully call the Court's attention to the recent amendment to our code in the Death By Wrongful Act Statute, (Public Law 676, 80th Congress, Chapt. 507, 2d Session. Approved June 19, 1948) as well as the Congressional Hearings held prior to the passage of this statute where it was pointed out clearly that Appellate Courts in that Statute should set aside judgments or enforce remittiturs where the verdicts are excessive and returned because of sympathy or other extrinsic factors. It is our belief that Congress is now bringing to the attention of Appellate Courts not only its power but its duty in this regard, and we believe that if this Court concludes that the verdicts are excessive under the evidence, that they should now assume this duty.

CONCLUSION

We respectfully submit that in view of the foregoing facts, authorities and arguments that the Trial Court erred in ruling that the defendant owed the infant plaintiff the highest degree of care; in admitting evidence which was prejudicial to the rights of the defendant, especially in permitting evidence to indicate that the defendant ought to have replaced the escalator upon which infant plaintiff was injured, with a later model prior to the date of the accident; that the judgment below was not in accordance with the evidence and the verdicts of the jury were excessive and that, this Court on review should reverse the judgment below and remand to the Trial Court with appropriate instructions as to the issues tendered.

Respectfully submitted,

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APPELLEES' BRIEF

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,035

THE HECHT COMPANY, INC., a corporation, *Appellant*

vs.

BETTY-LYNNE JACOBSEN, an infant by S. ELMER
JACOBSEN, her father, and S. ELMER
JACOBSEN, *Appellees*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,035

THE HECHT COMPANY, INC., a corporation, *Appellant*,

vs.

BETTY-LYNNE JACOBSEN, an infant by S. ELMER
JACOBSEN, her father, and S. ELMER
JACOBSEN, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

Preliminary

This is an appeal in an action for damages for personal injuries, instituted in the United States District Court for the District of Columbia, by the appellees, Betty-Lynne Jacobsen, an infant, by S. Elmer Jacobsen, her father and next friend, (hereinafter referred to as infant plaintiff) and S. Elmer Jacobsen, in his own behalf, for recovery for liabilities he incurred for medical, surgical and hospital expense for his infant daughter, as consequential damages by reason of said injuries to his said daughter, and for loss of services of his said daughter (hereinafter referred to as plaintiff father), against the Hecht Company, Inc.,

a corporation, appellant, (hereinafter referred to as defendant) from a judgment of said court, entered upon verdicts of a jury, in favor of the plaintiffs.

Counter-Statement of the Case

The infant plaintiff brought this action through her father as next friend, to recover damages for injuries to her person, caused by reason of her right fingers and hand being caught in the space or opening between the moving steps and comb plate of the down escalator from the third to the second floor, at the second floor landing, of an escalator owned, maintained, controlled and operated by the defendant, in its department store, as a result of the negligence of the defendant.

The father of the infant plaintiff, joined as a co-plaintiff on his own behalf, for recovery for liabilities he incurred for medical, surgical and hospital expense for his infant daughter, and to be incurred in the future, as consequential damages by reason of said injuries, and for loss of services of his said daughter.

The evidence of record shows that the infant plaintiff, age 3 years and 11 months, and her mother and a sister, Geraldine, age 7 years, at the time, went to the defendant's store on November 15, 1945, to buy a Brownie outfit and a pair of leggings for the older daughter, and to get some underwear for the infant plaintiff (App. 54, 55 & 74); that they arrived at the defendant's store at about 10 o'clock in the morning and went first to the second floor and then to the third floor, for the purpose of making purchases for the two children and that the children visited Santa Claus on the third floor and thereafter the mother proceeded with the children, by way of the down escalator, from the third to the second floor, (App. 55) for the further purpose of going to the children's department in the defendant's

store, located on the second floor, to purchase some underwear for the infant plaintiff; that the older daughter got on the escalator by herself and that she, the mother, had hold of the smaller child's (the infant plaintiff herein) right hand with her left hand, said child being on her left (App. 56 & 76) as they got on the escalator and went down approximately $\frac{1}{3}$ of the escalator, at which time the infant plaintiff impulsively broke away from her mother, by disengaging her hand from her mother's grip and proceeded on down the escalator (App. 56); that the mother attempted to prevent the child from doing so and to get her back, but she sped on a few steps ahead of the mother and that there were people on the escalator ahead of the mother, not immediately on the step ahead of her, but there were people going down the escalator and the mother pulled over to the other side of the escalator and followed the child down as soon as she could, but that there were sufficient people in front of her that she could not go on down the escalator (App. 56); that the older daughter had been on escalators before with her mother and that she had instructed her to put her hand on the rail and hold on carefully to the rail, and that generally she held her hand herself (App. 56); that as infant plaintiff neared the bottom of the escalator the mother was 8 or 10 steps back of her, at which time the infant plaintiff fell by reason of the movement of the steps and as they moved and carried her down she lost her balance and fell (App. 56 & 57); that in falling it pivoted her around and that she either sat down or fell so that her position was reversed as she came to a stop, in that she was facing up the escalator instead of down the escalator, her position before falling, at the bottom of the escalator where the steps break into the floor, with part of her hips on the floor and her side and chest across the moving part of the steps, at which time she put her hand down and the mother immediately saw a

panicky look come over her face and knew that she was hurt; that she tried to get to her but the people on the escalator were sufficient that she could not get to her, at which time she was 4 or 5 steps from her; that the infant plaintiff put her right hand down in attempting to help herself up and that as soon as the mother could reach her she bent over and tried to help her up and immediately found that her hand,—she saw and felt both that her hand was caught in the escalator where the fingers of the escalator come out and the steps ride in as it goes underneath the floor (App. 57); that the exact portion of the escalator she was speaking of is where the steps ride under, which is stationary,—the stationary fingers of the comb plate as the escalator steps go under the floor, between the moving steps and the comb plate (App. 58), to the right of the escalator as you go up the escalator, the infant plaintiff's hand being a few inches from the rail on the right side, going up (App. 58) (3 or 4 or 5 inches),—(App. 59); that the mother immediately called for help, but the movement of the steps of the escalator coming down and the motion itself, some way, caused the mother to be thrown from the escalator out onto the floor near the show cases and then she picked herself up and called again for help, and at the same time tried to get back to the escalator and look for some kind of a stop button to stop the escalator, at which time she perceived the steps were still moving but she was unable to see the stop button and could not find it, and that it was not obvious to view (App. 59); that before the time in question she had no knowledge of where the stop button was (App. 60); that she made three attempts—called three different times for help,—made three different attempts to get to the escalator and her child, but was not able to, because there was a crowd of people assembled around the escalator and that a gentleman, coming from the opposite side of the escalator, pushed his way

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through the crowd and got to the escalator as it was coming to a stop (App. 60); that the mother's estimate of the time it took for the escalator to be stopped indicated that it was not immediately but that it took some time (App. 60); that the gentleman who came in from the side, picked the infant plaintiff up and carried her up the escalator steps, which was then standing still, to the First Aid room, which was, as she recalled, on the fourth floor, and that she followed this gentleman (App. 61); that the infant plaintiff's finger was hanging down from her hand and that the back of her hand was badly mutilated, very bloody, covered with blood, and bleeding very badly (App. 61); that the infant plaintiff was thereafter taken to Children's Hospital and that the little finger on the right hand was hanging by the skin and thereafter taken off at the knuckle (meaning the entire little finger) and that there were several stitches taken on one of the fingers of the right hand and the other middle finger was also caught and injured and that the back of her hand was torn wide open (App. 64) and that the entire little finger was amputated by Dr. Robert J. Coffey (App. 64 & 65); that at this time, while the mother was testifying on the stand, the infant plaintiff, with the permission of the court, was presented immediately in front of the jury and held her right hand up and the injuries to her fingers and hand were pointed out to the jury by the mother, and counsel for defendant requested, which was permitted, to have the infant plaintiff open and close her hand in front of the jurors (App. 64 & 65). On cross-examination the mother testified that she had advised the children to hold onto the banisters as they went up and down the escalators, not necessarily because it was an element of protection for their safety but because it was an element that makes it easier for a passenger to use the escalator stairs; and whenever she took the children to the defendant's store, she did watch

them carefully and that she did not think she warned them every time she went into the store, to be careful, because she did not realize any danger existed (App. 72 & 73); that she never had permitted the older daughter to go up and down the escalator by herself; that she watched her children carefully as they went on the escalator to the third floor, that morning, and that she had hold of the infant plaintiff's hand (App. 74); that she didn't recall especially saying anything to the children about being careful upon getting on the down escalator at the third floor (escalator in question) but that she took every precaution to see that her children were on the escalator safely, and that after the older child was on the escalator she proceeded to walk down the steps and that she saw no danger in this because she had seen other people do this all the time while using escalators (App. 75); that the escalator was moderately full (App. 77); that when the infant plaintiff broke away from her, the mother could not have reached out and stopped her from weaving in and out between adult passengers as she walked down the escalator; that she tried to do so by going down as many steps as she could, following her and even tried to work her way through persons in front of her; that she was not aware of any danger on the escalator, had no way of knowing, and never heard of any accident on them and had never seen any warning not to take children on them, and was not aware of the fact there was danger other than the movement, and had no reason to be alarmed and never considered the steps of the escalator dangerous (App. 78 & 79).

No witness or evidence was produced by the defendant that contradicted the mother in any way as to what she did and the infant plaintiff did, or as to how the accident happened. Furthermore, there is no evidence that the mother made no effort to pursue the infant plaintiff as she

impulsively disengaged her hand from her mother's hand, but there is evidence that the mother actually did both (App. 56 & 57). The evidence further showed, that at the moment, just before and at the time, the infant plaintiff's fingers and hand were caught in the escalator, that there was nothing the mother could have done to have prevented the infant child from catching her fingers and hand in the escalator, the situation, at that moment, being entirely beyond her control (App. 56 & 57). There was no controverting evidence offered on behalf of defendant disputing the manner in which the infant plaintiff was injured, or the portion of the escalator that injured her, but in fact the testimony of Howard P. Lewis and Jack Fauer, witnesses called by the defendant, supported the mother's testimony in these respects (App. 191, 192, 193 & 196).

The evidence of record shows that another little child, approximately 3 years old, was injured in the defendant's store, at the first floor level, by down escalator (App. 132, 133 & 134),—the same type and kind of escalator as the escalator by which the infant plaintiff was injured, prior to the time the infant plaintiff was injured (App. 132, 133 & 134,—Witness Beale,—App. 94 & 95, Witness Knox,—107, Witness Bray).

The record shows that the plaintiff introduced evidence tending to show that the defendant was negligent in using the escalator in its dangerously constructed condition, particularly with reference to children, in not properly supervising the operation thereof and in the running and operating of the escalator, in that the escalator was in operation and that it was so constructed that there was an opening in which the infant plaintiff's fingers and hand could get caught, in consequence of which the infant plaintiff sustained the injuries of which she complains. In this connection the record shows: (1) That the defendant failed to protect or cover the moving and exposed parts of said

escalator, at the points or places where the fingers and hand of the infant plaintiff could be caught or inserted and injured, namely, the opening at the comb plate and moving step or steps, when, by the exercise of the care required of the defendant under the law, such parts or openings could have been protected or covered (see photographs,—Plaintiffs' Exhibits Nos. 3, 4 & 5 of the old 1934 model escalator, filed with original lower court record) and (jury's view of premises, App. 200); (2) that the failure of the defendant to protect or cover the moving and exposed parts and openings of said escalator at the points or places where the fingers and hand of the infant plaintiff could be caught or inserted and injured, created a dangerous condition which the defendant already had full knowledge of by prior and similar accident (App. 132, 133 & 134); (3) that the defendant negligently invited infant plaintiff to its store when it knew that she might be injured by the dangerous condition of said escalator as heretofore stated (testimony of Mrs. Jacobsen, Knox, Bray and Beale, App. 54 & 55—93, 94, 102 & 103—107—132, 133 & 134); (4) that defendant, its agents and servants, failed to warn infant plaintiff of the dangerous condition of said escalator when it had full knowledge thereof and could have done so (testimony of Witness Knox, Bray and Beale, App. 95, 97—106—132, 133 & 134); (5) that defendant carelessly and negligently permitted said escalator to be and remain unguarded at the time and place infant plaintiff's injuries were sustained; (6) that defendant permitted said escalator to remain in a dangerous condition when it knew and had full knowledge of the danger (App. 132, 133 & 134); (7) that the defendant failed to provide attendants at either end of the escalator (App. 106) to assist, caution or give directions to infant plaintiff, as to the proper position to be taken on the escalator, the preserving of her balance and the avoidance of any effort to

press forward as the escalator neared the second floor, in its descent from the third floor, when said defendant knew of the existing dangerous mechanical condition, particularly with reference to children, the age of infant plaintiff, by reason of the prior similar accident in its store. This evidence showed that the defendant knew that the point at which the moving step entered the second floor where the infant plaintiff was injured, was the point of greatest danger, and from the evidence, defendant provided no protection at this point to prevent the happening of accidents at this point, particularly to children.

The defendant in its answer, alleged that the escalator which caused the infant plaintiff's injuries, maintained by it, "was in a safe and proper condition, * * * and that it is the usual and approved type of such escalator generally in use", (App. 6). The evidence of record shows that the defendant also had in use in its store, at the time the infant plaintiff was injured, but not at the time of the prior similar accident, a newer type escalator, installed subsequent to the one causing the infant plaintiff's injuries and one causing injuries in the prior similar accident, (Witness Knox, customer relations manager of defendant—called as a witness by plaintiffs, App. 92-97 & App. 101-104) and (Witness Bray, chief engineer of defendant,—called as a witness by plaintiffs, App. 104-108 & 115-119). The photographs of the old type, causing the plaintiff's injuries and the injuries in the prior similar accident, (see Plaintiffs' Exhibits Nos. 3, 4 & 5, filed herein with original transcript of record of lower court, introduced by plaintiffs,—App. 34 & 35), installed by the defendant in June, 1934, and the newer type escalator, installed by the defendant in September, 1941, (see Plaintiffs' Exhibits Nos. 6 & 7, filed with record introduced by plaintiffs,—App. 50, 101, 102 & 103) showed that there is less space between the escalator step as it passes the comb plate and disappears

under the floor, in the newer type escalator, than in the old type escalator, of which the defendant had knowledge, both being in use in the defendant's store at the time infant plaintiff was injured on November 15, 1945, and showed that the newer type is safer for use, particularly by children of tender years, and showed that the use of the older model escalator was dangerous and less safe, whereas the use of the new model escalator was not dangerous and more safe. No objection was made by defendant to the introduction, by plaintiffs, of the photographs of the old model escalator, (Plaintiffs' Exhibits Nos. 3, 4 & 5, App. 34 & 35). Objection, however, was made to the introduction, by plaintiffs, of the photographs of the new model escalator (Plaintiffs' Exhibits 6 & 7, App. 36 & 51), but said objection was properly overruled by the trial court (App. 100 & 101) and the same were introduced by the plaintiffs in evidence (App. 102). Both the old and new type escalators were the product of The Otis Elevator Co., and installed by it, for the defendant, in the defendant's store on the dates above indicated (App. 103, cross-examination by defendant of Witness Knox and App. 108, cross-examination by defendant of Witness Bray). This fact was brought out by the defendant although defendant had objected to Plaintiffs' Exhibits Nos. 6 & 7, photographs of the new 1941 model, and the further fact that the new 1941 model escalator *was much improved* as compared to the old 1934 model, was also brought out by the defendant (App. 103), which, we think, had the effect of waiving the objection previously made thereto, by the defendant.

Dr. Robert J. Coffey, witness for the plaintiffs, testified that the injuries to the child's hand consisted of a double avulsion of the little finger and laceration of other fingers, the second and ring fingers of her right hand and that the skin had been torn from the dorsum of the right hand and lacerated, and that the tissues thereof had not only been

torn ~~and~~ but they had been mashed too, (App. 22 & 23) and the situation demanded immediate amputation of the small finger; that the operation consisted of the removal of the small finger, the repair of the tendons that were destroyed as a result of the injury, exploring the region for other severed tendons and exploring lacerations of the other fingers, and carrying out a plastic procedure on the hand, that is, the rejoinder of the skin lacerations and sewing them up (App. 22 & 23); that subsequent thereto, the infant plaintiff developed a keloid in her scar where it extended up the dorsum of the right hand, an outgrowth of the scar tissue forming a very prominent scar, which occurs in certain people, and it happened to occur in this case; that there are a certain group of individuals who for some reason develop an abnormal production of scar tissue, creating high, unsightly, unnecessary large scars, and that is what developed in the infant plaintiff's case (App. 24 & 25); that the disability of the infant plaintiff, by reason of the loss of the little finger was somewhere between 10 and 20% (App. 26); that a plastic repair operation, including hospital expense, would cost approximately \$750.00 to \$1,000.00; that such operation should and could be performed to have the unsightly scar excised, with the hope of diminishing the same, but that there was no guarantee that it would be removed and that there was a possibility of the keloid scar reforming where the new scar would be formed (App. 30). Dr. Coffey's entire testimony (App. 21-33) shows the serious and permanent nature of the infant plaintiff's injuries (see photographs of hand, Plaintiffs' Exhibits 1 & 2, filed herein with original transcript of record of lower court).

Edgar R. Ray, employed as a District elevator inspector, witness called by the defendant, testified that his inspections of the escalators operated by the defendant in its store, had nothing whatsoever to do with the width of

space between the steps of the down escalator in question, as they meet the comb plate, and made no notation as to such distance in his reports, because the elevator regulation does not give any distance, but that the elevator regulation has nothing to do with said space, and that his testimony on direct examination was with respect to other things relating to the escalator (App. 175); that in his inspections he had noticed that the escalators in the defendant's store from the third to the seventh floor were a more new and modern type and that the defendant only had two floors with the old type escalator installed in 1934, from the first to the second and second to the third floors, and that he had had an opportunity to observe the old and new type escalators in making his inspection, and from his observation thereof, the space between the steps in the newer type that was installed in 1941 is much less as the steps meet the comb plate than the space between the old type, as the steps meet the comb plate, and that it was much easier for an object to get caught in the old type in that space than in the new type, and that although the defendant was supposed to report accidents on escalators to the District authorities, the defendant had not reported the accident on November 15, 1945, involved in the case at bar, or the prior similar accident (App. 175 & 176); that he would consider the fact that the aperture of the 1934 installation in the defendant's store would catch a child's hand and cut the finger off, as a hazard, but that he, as an inspector, could not do anything about it after once accepted by the District (App. 179).

At the request of counsel for plaintiffs (App. 162 & 163) and over the objection of the defendant (App. 164), for a view of the defendant's premises, including the old 1934 model escalator and the new 1941 model escalator, the court granted said request (App. 163, 164 & 165) and the jury, in the care of a Deputy Marshal, together with

the trial judge, counsel for both parties, clerk, and reporter, assembled and walked to the Hecht Company's store, where a view of the defendant's premises and the escalators was had (App. 199 & 200).

The court, thereafter, charged the jury on all phases of the applicable law, based upon the evidence, and did not go beyond the scope of the evidence, and correctly, and nowise unfavorable to the defendant, instructed the jury as to the law applicable to the facts in evidence and all of the issues involved were, thereby, properly submitted to the jury. The trial court carefully outlined the issues between the parties and defined and explained the legal principles involved (App. 214-227). We think, the charge was fair, accurate and complete. No objection was made by defendant to the court's charge to the jury (App. 226 & 227). The case was thereupon submitted to the jury and the jury returned a verdict in the sum of \$15,000.00, on behalf of the infant plaintiff, and a verdict in the sum of \$2,000.00, on behalf of the plaintiff father.

The defendant, thereafter, moved for a new trial, including a motion to set aside or order a remittitur on the ground that the damages awarded were excessive, but said motion was properly denied by the court.

At the request of the defendant, and with consent of counsel for plaintiffs, the lower court signed an order allowing original exhibits to be filed on appeal, including the photographs referred to above of the escalators, (Plaintiffs' Exhibits Nos. 3, 4, 5, 6 & 7) as well as two photographs of the infant plaintiff's hand (Plaintiffs' Exhibits Nos. 1 & 2), hereafter referred to, to be used in their original form at the time of the argument on appeal and upon consideration of said appeal to the same extent as though included in the printed appendix, to be filed on appeal. A copy of this order is included in the transcript of the record of the lower court, filed with this Court.

Summary of Argument

The points on which defendant relies will be considered and discussed herein, by counsel for plaintiffs, in the order treated by counsel for defendant in the brief filed herein, on behalf of the defendant.

ARGUMENT AND AUTHORITIES

I

The defendant did owe to the plaintiffs, the highest degree of care in the construction, maintenance and operation of the escalator upon which the infant plaintiff was riding, as an invitee passenger.

It is settled law in this jurisdiction that the highest degree of care is owed by the owner and operator of a passenger elevator in a public building to his invitee passengers. It has been so held by this court on three different occasions in three different decisions. First, in *Munsey v. Webb*, 37 App. D. C. 185, 287 Fed. 62, affirmed by the Supreme Court of the United States, 231 U. S. 150, 58 L. Ed. 162. Second, in *Southern Ry. Co. v. Taylor*, 57 App. D. C. 21, 16 Fed. (2nd) 317. Third, in *Goldenberg Co. Inc. v. Schicht*, 65 App. D. C. 336, 83 Fed. (2nd) 593.

While, it is true that this court held in the *Southern Ry. Co.* case, *supra*, (at bottom of page 26) that “* * * it logically follows that the operator of an escalator in an office building is not a common carrier nor is he engaged in commerce * * *”, this Court also held that an owner and operator of an elevator in a public building is chargeable with the same degree of care for the safety of passengers as is a common carrier. In this connection, Mr. Justice Van Orsdel, speaking for the Court at page 27, said:

“ * * * It is undoubtedly true that the same high degree of care is required for the safety of passengers by the operator of an elevator in a public building as is imposed upon a common carrier. * * * ”

This is the precise thing done in the case at bar. The trial court ruled (App. 40, 41, 100) that the defendant was not a common carrier, but “that the same degree of care is required of the operator of an elevator as is required of a common carrier, namely, the highest degree of care, although for certain purposes they are distinguishable from a common carrier. * * * ” (App. 100), and said ruling was made by the trial court out of the presence of the jury during a discussion of the question as to what degree of care was owed by the defendant. Nowhere in the trial court’s charge to the jury (App. 214-227), does the court even use the expression “common carrier”, or that the defendant should be held to the highest degree of care such as is imposed upon common carriers, but the court did charge that, under the facts disclosed by the evidence of record, the defendant did owe the highest degree of care. The question before this Court in the *Southern Ry. Co.* case, *supra*, turned on the application or non-application of “fellow-servant doctrine” and also that the Employers’ Liability Act June 11, 1906 (34 Stat. 232) abolishing the fellow-servant doctrine as applied to common carriers “engaged in trade or commerce”, must be interpreted as relating solely to commerce. These matters are in no way involved in the case at bar. Furthermore, the defendant does not question the fact that the infant plaintiff and her mother were invitee passengers on the escalator causing the injuries to the infant plaintiff and counsel for defendant concedes that “so far (as) this is concerned, escalator and elevator mean the same thing, because they are means of transportation in common use” (App. 39), also (Deft’s. Brief page 10).

The opinion in the *Southern Ry. Co.* case *supra*, at page 27, continued by quoting approvingly from *Munsey v. Webb, supra*, and *Mitchell v. Marker*, (C. C. A.) 62 Fed. 139, 25 L. R. A. 33, perhaps the leading case on this question (referred to and quoted from by this Court in *Munsey v. Webb, supra*), as follows:

“* * * In *Munsey v. Webb*, 37 App. D. C. 185, an elevator case, we said: ‘It is important at the outset to consider the duty which defendant owes to persons entering his building for legitimate purposes, and using the elevators placed therein for their accommodation. The building in question is a business block devoted to public use. The elevators are an essential part of the building, and persons using them do so by the invitation of the defendant. It follows, therefore, that defendant in this instance is a carrier engaged in the transportation of passengers. While not, in the strict sense, an insurer, he is required to exercise the highest degree of diligence and care for the safety of persons using his elevators as agencies of transportation. *It is doubtful if there is any known method of conveyance in which a higher degree of care is required in its construction and operation than that of an elevator.*’ ” (Italics ours.)

“In *Mitchell v. Marker*, (C. C. A.) 62 F. 139, 25 L. R. A. 33, where a passenger in an elevator in a public building was injured by the alleged negligence of the operator, Mr. Justice Lurton, speaking for the court said: ‘We see no distinction in principle between the degree of care required from a carrier of passengers horizontally, by means of railway cars or stagecoaches, and one who carries them vertically, by means of a passenger elevator. The degree of care required from carriers by railway or stagecoach is the highest degree. Neither is an insurer, but, in regard to each, care short of the highest degree becomes, not ordinary care, but absolute negligence.’ ”

Continuing at page 27, this Court also said:

“In these cases the courts were considering the degree of care required of the operator of an elevator toward his passengers, as compared with the degree of care imposed upon a common carrier under similar

circumstances. *This comparison is induced by reason of the similarity of the duty each owes to those under his care, not to the similarity of service. A streetcar, for example, and an elevator, are both instrumentalities for the carrying of passengers, and the duty of exercising the highest degree of care in their operation for the safety of passengers is equally imposed. * * ** (Italics ours.)

At page 10 of defendant's brief, counsel for defendant quotes only that portion of the *Southern Ry. Co.* case referring to what this Court had to say about the question of the common carrier aspect of the opinion (which has no application to the case at bar because the trial court did not rule that the defendant herein was a common carrier, but on the contrary ruled that it was not, as hereinabove stated), and failed to quote that portion of the opinion referring to what this court had to say about the similarity of the duty of a common carrier and an operator of an elevator wherein this Court said the exercising of the highest degree of care in their operation for the safety of passengers is equally imposed, which is what the trial court was bound to and did properly follow in ruling that the defendant owed, to the infant plaintiff, in the case at bar, the highest degree of care.

The *Munsey v. Webb* case was affirmed by the United States Supreme Court, in *Munsey v. Webb*, 231 U. S. 150, 58 L. Ed. 162, wherein the Court, among other things, speaking through Mr. Justice Holmes, at page 156, said:

"* * * The defendant is sued for having crushed the head of the deceased by forces that he put in motion. He replies that it would not have happened but for the unforeseen fall of the deceased without the defendant's fault, and to this the plaintiff rejoins and the jury has found that the defendant was bound to take the easy precaution which he had provided against any and all ways by which a passenger's body could get outside the car while it was going up. *Hayes v. Michigan Central R. R. Co.*, 111 U. S. 228, 241, *Choc-*

taw, Oklahoma & Gulf R. R. Co. v. Holloway, 191 U. S. 334, 339. The whole question comes down to whether we are prepared to say as a matter of law against the finding of the jury that, *in an elevator constructed as this was with a special source of danger* in the shaft outside the car, to require the defendant to guard the door space in transitu, at his peril, is too strict a rule. We cannot go so far. *McDonald v. Toledo Consol. S. Ry. Co.*, 74 Fed. Rep. 104, 109. (Italics ours.)

"There was perhaps evidence sufficient to warrant a finding that there was negligence in not stopping the car after the fall and before the harm was done, and a finding on that ground would not open the questions that have been discussed; but we have preferred to deal with the case on the matters principally argued, as they seem to offer the most obvious reasons for the verdict, and therefore have assumed that the jury found the *facts and standard of conduct* to be as we have supposed." (Italics ours.)

The question of the degree of care owed by the operator of a passenger elevator was again passed upon by this Court in the case of *Goldenberg Co. v. Schicht*, 65 App. D. C. 336, 83 Fed. (2nd) 593, in which this Court held that the highest degree was owed, wherein this Court said:

"We are unable to agree with the defendant's contention. The degree of care required of defendant *in the construction and management of the passenger elevator* is well set out in the language of Mr. Justice Van Orsdel in the case of *Munsey v. Webb*, 37 App. D. C. 185, 187, affirmed 231 U. S. 150, 34 S. Ct. 44, 58 L. Ed. 162, wherein it is said:" (at this point in the *Goldenberg* case this Court quoted the same quotation from the *Munsey v. Webb* case as was quoted by this Court in the *Southern Ry. Co.* case) (Italics ours).

Continuing, this Court in the *Goldenberg* case further said:

"In our opinion the record does not disclose that the appellant exercised in this instance *such a degree of care as is thus required*. Appellant claims that it would be impossible by careful inspection to detect breaks of the wires occurring within the babbitt metal,

and this is doubtless true. It is also doubtless true that this manner of fastening the end of the cable into the shackle bolt is recognized as a *correct method of construction*, and as it appears from the record accidents caused by breaks of the wires within the babbitt metal are exceedingly rare and almost unheard of. Nevertheless the possibility that such breaks may occur makes it necessary when such means are used of fastening the cables to the car to provide by proper renewal of such material at frequent intervals in order to prevent accidents such as the one now in question. Such renewals would require comparatively little time or expense. In fact, after the occurrence of this accident it appears that the ends of the cables were quickly sawed off and re-babbitted and locked again in the shackle bolt and that the operation kept the elevator out of use for only a short time." (Italics ours.)

"The jury was entitled on the evidence to find that the defendant's failure to exercise such vigilance in preventing accidents caused by the breaking of the wires within the babbitt material was *culpable negligence*. We therefore hold that the judgments of the lower court upon the verdict should be and they are affirmed with costs." (Italics ours.)

Hence it will be observed from the *Goldenberg* case, *supra*, that this Court approved its former holding that the highest degree of care is the proper degree of care to be applied to the operator of a passenger elevator, announced by it in the *Munsey* case, *supra*. The comment made by counsel for defendant at page 10 of defendant's brief that Mr. Justice Stephens dissented in the *Goldenberg* case, *supra*, is incorrect, the fact being that Mr. Justice Stephens wrote a concurring opinion in which he concurred in the result of the majority opinion, but differed as to the degree of care to be applied.

In discussing why the highest degree of care should apply to an owner and operator of an escalator, in the case of *S. S. Kresge Co. v. McCallion*, 58 Fed. (2nd) 931, one

of the leading federal cases frequently cited, and referred to in text books, the court, at page 932, had this to say:

"In attempting definitions of care in the law of negligence, courts have endeavored to make certain classifications and have announced rules. These attempts are rather futile, meaningless and difficult of practical application and use. Note to *St. Louis I. M. & S. Ry. Co. v. Woods*, 33 L. R. A. (U. S.) 855. In all situations, the rule is such care as a reasonable prudent man would exercise in view of all the surrounding circumstances. The effect of further attempts at classified definitions is simply to declare that certain 'surrounding circumstances' require more care than do others. This thought is recognized in a late Missouri case (*Capstick v. T. M. Sayman Products Co.*, 327 Mo. 1, 34 S. W. (2nd) 480), where liability was announced where a person fell on a poorly lighted, worn, concrete stairway which was made slippery by being wet, although, in the cases cited above, a wet or slippery step or floor in plain view was held no basis for liability."

"It is true that the general situation or set of surrounding circumstances affecting the carriage of persons has caused the courts to announce a rule that such carrier owes a 'high degree' of care to its passengers, but this is no departure from the general rule of ordinary care under all the surrounding circumstances. However, since such rule as to carriers is universally recognized and applied we consider this case with that in view. Obviously, if this escalator is to be classed as a carrier, the carrier rule is applicable. Appellant contends that the *distinguishing test* of a carrier within this rule is the danger of serious injury from the mode of carriage. This danger may well be an important element, or 'circumstance', to be always considered when the care of a carrier toward its passenger is in question, but we would be slow to say that it is the acid test. However, if it is to be regarded as the prime test, we see no reason why it should not apply here. An escalator carries people, often many at the same time, from one floor of a building to another. It seems clear that there is the possibility of great injury in its operation. Suppose the steps should suddenly fold up hurling the people upon it down to the lower floor in a heap or should violently stop or

start while a person is being carried on the steps. For instances, see *Petrie v. Kaufmann & Baer Co.*, 291 Pa. 211, 139 A. 878, and *McBride v. May Dept. Stores Co.*, 39 Ohio App. 420, 177 N. E. 773. It can well be regarded as a 'carrier' within the meaning of this rule as to negligence and care. *Petrie v. Kaufmann & Baer Co.*, 291 Pa. 211, 139 A. 878; *McBride v. May Dept. Stores Co.*, 39 Ohio App. 420, 177 N. E. 773. *Whether the escalator is technically a 'carrier' or not is really not vital, since the nature of this form of transportation is such that the same degree of care should, at least by analogy, be required.* In an elevator case, Judge (later Justice) Lurton (*Mitchell v. Marker* (C. C. A.) 62 Fed. 139, 142, 25 L. R. A. 33) said: 'We see no distinction in principle between the degree of care required from a carrier of passengers horizontally, by means of railway cars or stagecoaches, and one who carries them vertically, by means of a passenger elevator. The degree of care required from carriers by railway or stagecoach is the highest degree.' Similarly, we see no distinction in principle in the care required in transporting persons from one floor to another on an escalator slanted at forty-five degrees." (Italics ours.)

"If it is to be so classified, it is obvious that this relation obtains during the alighting therefrom. Such is the view as to other kinds of carriers (cases cited). *It should even more clearly be the rule as to escalators, because in other kinds of carriage the vehicle is supposed to be stationary at the time of alighting while the escalator does not alter its speed and the passenger must alight while it is moving and usually within a confined time and space and here at an angle.*" (Italics ours.)

"Clearly, it is not due care to furnish a slippery surface at the only place where the passenger must step from a moving escalator. The evidence here is abundant that this was just what appellant did."

It is likewise clear, we think, that it is not due care to furnish an escalator for the use of invitee child passengers so constructed, at the point where they must, in descending, get off, that there is an opening, between the step or steps and the comb plate of the escalator, as said steps meet the

comb plate and disappear under the floor, at floor landings, in which a child's fingers and hand could be caught, particularly where, as here, the defendant knew of such dangerous construction and condition, and knew that a child's fingers and hand could get caught, in the opening mentioned, because on a prior occasion to the accident in question another child approximately 3 years old (App. 132) had his fingers and hand caught in the same and very opening and at the same point of the escalator, of the same type and kind of down escalator, from the 2nd to the 1st floor, between the step and the comb plate where it disappears under the 1st floor, in the defendant's store (App. 119 to 136), as the escalator on which the infant plaintiff herein (3 years, 11 months old) was a passenger, in a similar accident to the one involved in the case at bar. The evidence of record, in the case at bar, shows that this was just what the infant plaintiff did.

Another leading case on this subject is the case of *May Department Stores Co. v. Bell*, 61 Fed. (2nd) 830, wherein many decisions are cited in support of the various questions involved. This case involved injuries to a 4 year old boy by reason of his left foot being caught on a broken tooth of an escalator. The Appellate Court reversed the trial court as to damages only, but upheld the trial court as to liability and application of the doctrine of *res ipsa loquitur*. On the question of the degree of care owed by the operator of a *passenger escalator*, the court speaking through Judge Sanborn, at page 834, said:

"The duty imposed by law upon a *carrier by escalator* for the *care and protection* of passengers has been held by this court to be the same as the duty imposed upon a carrier of passengers by stagecoach, train, or elevator." (Cases cited and quoted from—among them the leading case, previously hereinabove quoted, of *Mitchell v. Marker*, *supra*). (Italics ours.)

Continuing the court further said:

“* * * Similarly, we see *no distinction in principle* in the care required in transporting persons from one floor to another on an escalator slanted at forty-five degrees.”

“It follows that the rule as to what evidence will make a *prima facie* case in favor of an injured passenger is the same whether the accident which caused the injury occurred upon an escalator, an elevator, or a railway car.” (Italics ours.)

“In the case of *Gleeson v. Virginia Midland Railroad Co.*, 140 U. S. 435, 443, 11 S. Ct. 859, 862, 35 L. Ed. 458, the court said: ‘Since the decisions in *Stokes v. Saltonstall*, 13 Pet. 181 (10 L. Ed. 115), and *(New Jersey) Railroad Co. v. Pollard*, 22 Wall, 341 (22 L. Ed. 877), it has been settled law in this court that the happening of an injurious accident is, *in passenger cases, prima facie* evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its *whole duty was performed, and that the injury was unavoidable by human foresight*. The rule announced in those cases has received general acceptance, and was followed at the present term in *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, ante, 653, (11 S. Ct. 653, 35 L. Ed. 270).’ ” (Italics ours.)

In *McBride v. May Department Stores Co.*, 39 Ohio App. 420, 177 N. E. 773, (escalator case) (affirmed by Ohio Supreme Ct. 178 N. E. 12) the Court, at page 775, said:

“We further hold there is no difference in principle between the ownership and operation of an elevator and an escalator. These are installed for the same purpose; the only difference being that one runs in perpendicular fashion and the other at an angle of approximately forty-five degrees. Both are constructed for the benefit of customers to visit the establishment of the owner. Undoubtedly the owner profits from the installation and operation of each. An innkeeper profits because of the supposed increased patronage of his inn due to the installation of such a conveyance as an elevator. A storekeeper profits due to the supposed

increased patronage of his store by the installation of an escalator, which is simply a moving stairway. Both are taken into account by the proprietor and by the customers as a part of the commodity bought or sold; in the one case, personal services, in the other, merchandise.

"We hold, therefore, that it is the duty of the store-keeper owning and operating such an escalator *to exercise the highest degree of care in its management and operation*, and that the common pleas court, in *charging the jury that only ordinary care was required, committed reversible error.*" (Italics ours.)

In *Petrie v. Kaufmann & Baer Co.*, 291 Pa. 211, 139 A. 878 (escalator case), at page 213, the court said:

"As an escalator and an elevator perform the like service of conveying people from one elevation to another, they are subject to like duties and responsibilities. The passenger is at least as powerless to influence the action of the former as the latter. Hence, the rule that an elevator is *deemed* a common carrier applies equally to an escalator. While a carrier is not an insurer of the safety of the passengers, *he is bound to exercise the highest practical degree of care for their safety*, and where a passenger is injured through some defect in the means of transportation or the manner of operation, the burden is upon the carrier to show *it could not have been prevented by human foresight*. 'But though, in legal contemplation, they (common carriers) do not warrant the absolute safety of their passengers, they are yet bound to the exercise of the utmost degree of diligence and care. The slightest neglect against which human prudence and foresight may guard, and by which hurt or loss is occasioned, will render them liable to answer in damages. Nay, the mere happening of an injurious accident, raises, *prima facie*, a presumption of neglect, and throws upon the carrier the onus of showing it did not exist.' *Laing v. Colder*, 8 Pa. 479, 481, 482, (other cases cited)." (Italics ours.)

Even where the injured child (boy 4 yrs. old) was not a passenger at the time of injury, (and for that reason the

highest degree of care could not be applied), but whose right hand got caught in an escalator, "between the comb plate and the steps passing under" (page 180), (the same point of the escalator, as the case at bar), while he was in the defendant's department store with his mother "who went to this department to exchange a suit bought for another of her children, taking plaintiff with her" (page 180), the Court of Appeals of the State of California, in the case of *Kataoka v. May Dept. Stores Co.*, 80 Cal. App. (2nd) 778, in dealing with the duty a department store owner, operating an escalator therein provided for the use of its customers, owed to a child of tender years, at page 182, had this to say:

"The term 'ordinary care' is a relative one, and the standard by which it is to be measured varies * * * with the circumstances attending each particular case'. (19 Cal. Jur. 579; *Lolli v. Market St. Ry. Co.*, (1941) 43 Cal. App. 2nd 166, 168 (110 P. 2nd 436). 'Care must be in proportion to the danger to be avoided and the consequences that may reasonably be anticipated as the result of conduct, and the circumstances may be such that far greater care is exacted from one party to an action than from the other.' (19 Cal. Jur. 579, 580; see *Hatzakorjian v. Rucher-Fuller Desk Co.* (1925) 197 Cal. 82, 98, 239 P. 709, 41 A. L. R. 1027)."

"One of the factors affecting the care to be exercised may be the presence of children on the scene. In this case the accident happened in the infants' and children's wear department of a large store * * *."

Continuing, bottom of page 182, the court further said:

" 'A child of immature years is expected to exercise only such care as pertains to childhood, and all persons dealing with such a child are chargeable with such knowledge. As a result, one dealing with children is bound to exercise a greater amount of caution than he would were he dealing with an adult.' (cases cited and quoted) * * * 'A reasonable person is expected to know this and to govern his actions according, so that when a child liable to be injured cannot be expected to exercise the usual quantum of care, a greater amount of caution is necessary on the part of the one whose

act might cause injury.' This rule was applied to a variety of circumstances in cases just cited. It is a general rule applicable in any case where negligence toward children is involved and must be given full effect as between the operator of a business and children whom he invites to come upon his premises for business reasons. (45 C. J. 838.)"

In *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, another California case, which was quoted with approval, by Judge (later Justice) Lurton, in *Mitchell v. Marker*, *supra*, 62 Fed. 139, (at page 143) the Supreme Court of California, in passing upon the degree of care owed by a store owner to their customers as passengers on an elevator, held that the defendant owed the highest degree of care, wherein the court in very appropriate language, at page 591 said:

"The same degree of responsibility must attach to one controlling and running an elevator. Persons who are lifted by elevators are subjected to great risks to life and limb. They are hoisted vertically, and are unable, in case of the breaking of the machinery, to help themselves. The person running such elevator must be held to undertake to raise such persons safely, as far as human care and foresight will go. The law holds him to the utmost care and diligence of very cautious persons, and responsible for the slightest neglect.

"Such responsibility attaches to all persons engaged in employments where human beings submit their bodies to their control by which their lives or limbs are put at hazard, or where such employment is attended with danger to life or limb. The utmost care and diligence must be used by persons engaged in such employments to avoid injury to those they carry. The care and diligence required is proportioned to the danger to the persons carried. In proportion to the degree of danger to others must be the care and diligence to be exercised; where the danger is great, the utmost care and diligence must be employed. In such cases the law requires extraordinary care and diligence."

"We know of no employment where the law should demand a higher degree of care and diligence than in the case of the persons using and running elevators for

lifting human beings from one level to another. The danger of those being raised is great. When persons are injured by the giving way of the machinery the hurt is always serious, frequently fatal; and the law should, and does, bind persons so engaged to the highest degree of care practicable under the circumstances. It would be injustice and cruelty to the public in courts to abate in any degree from this high degree of care. *The aged, the helpless, and the infirm are daily using these elevators.* The owners make profit by these elevators, or use them for the profit they bring to them. The cruelty from a careless use of such contrivances is likely to fall on *the weakest of the community.* All, including the strongest, are without the means of self-protection upon the breaking down of the machinery. *The law, therefore, throws around such persons its protection, by requiring the highest care and diligence.*" (Italics ours)

From the foregoing authorities and the facts and circumstances involved in the case at bar, we think, the better and safer rule is to require of the owner of a department store, with its doors, by invitation, for gain and profit, open to the general public, including children of all ages, day in and day out, maintaining, controlling and providing an escalator for their use, the highest degree of care, because of the greater danger (better known to the owner) and consequently the greater possibility of injury by reason of the attendant circumstances always present in the use of such a dangerous instrumentality of this character, and it would, we believe, be a grave mistake to require otherwise, namely, any lesser degree of care, notwithstanding, the rule prevailing in the States of New York, New Jersey, Rhode Island, Connecticut and Massachusetts, to the contrary, (referred to at page 16,—Deft's Brief) which seem to require the care of an ordinary prudent person under the circumstances, (*Firzt v. Capitol Park Realty Co.*, 98 Conn. 627, 635, 120 A. 300, 29 A. L. R. 17, cited at pages 16 and 17, (Deft's Brief), and which perhaps under the circumstances

would amount to, or could be the same as, the highest degree of care, under the care and diligence required proportioned to the danger, or in proportion to the degree of danger doctrine. This, we also think, is especially and more so, where, as here, disclosed by the evidence of record, a child not quite 4 years (App. 54) old is involved and there were no attendants at either end of the escalator, (App. 106) "to assist, to caution, or give directions to passengers with respect to the manner of getting on or getting off, or the position to be maintained while on the escalator," (*Reynolds v. May Dept. Stores Co.*, 127 Fed. (2nd) 396, at page 396), obviously the point of greatest danger, particularly to a child the age of the infant plaintiff, and where "an attendant might be required at that point to prevent the happening of just such an accident as this", (*May Dept. Stores Co. v. Bell*, 61 Fed. (2nd) 830, at page 836, also cited above), and where no signs were posted by the defendant, prohibiting children to use escalator, or not to use them unaccompanied by their mothers (App. ~~180~~¹⁸⁶-95) or tell passengers how to use the escalator (App. 95).

In the light of the cases cited hereinabove, and many others which could be cited supporting the same question, and in view of the facts disclosed by the evidence of record in the case at bar, we do not think there is any good reason why this Court ought to reverse itself, as contended and suggested by counsel for defendant at page 10 of Defendant's Brief, and establish a standard of care of any lesser degree than the above authorities hold for, namely, the highest degree of care.

The *Munsey v. Webb*, case, *supra*, (elevator case) as previously stated herein, was affirmed by the Supreme Court of the United States, 231 U. S. 150, and, we think, it is fair to assume that if the Supreme Court did not agree with this Court on what this Court said with respect to the application of the highest degree of

care, the Supreme Court would have said so in its opinion of affirmance, even though it held as it did on the question of proximate cause. Then too, the language used by this Court (which includes identical statement referred to in Deft's Brief at page 9 and 10) in the *Munsey* case was later quoted with approval by this Court in the *Southern Ry. Co.* case, *supra*, (elevator case). Moreover, this same language and same statement used by this Court in the *Munsey* case was again approved and quoted by this Court in the *Goldenberg Co.* case *supra*, (elevator case), wherein this Court, in announcing and deciding the degree of care which should apply to the owner and operator of an elevator, held that the highest degree of care applied, (65 App. D. C. 336, at page 337). Furthermore, the fact that an owner and operator of an elevator or escalator should be held to the highest degree of care seems to be the Federal rule, and is in accord with the great weight of authority.

Gleeson v. Virginia Midland Railroad Co., 140 U. S. 435, 11 S. Ct. 859, 35 L. Ed. 458.

Stokes v. Saltonstall, 13 Pet. 181, 10 L. Ed. 115.

II

The photographs of the later escalator being used by the defendant in its store prior to and at the time of the accident in question, and other evidence in connection therewith, introduced in evidence by plaintiffs, was competent evidence bearing on the issues involved, and properly received by the court, and the court did not indicate to, or say to the jury, that such evidence indicated that the defendant, in order to avoid a finding of negligence by the jury was obliged to replace the 1934 escalator with a later model installed by the defendant in its store in September of 1941, but left the matter for the jury to decide.

The evidence of record shows that another little child, approximately 3 years old, was injured, in the defendant's

store, (App. 132 & 133) by the same type and kind of escalator as the escalator by which the infant plaintiff was injured, at the first floor level, prior to the time the infant plaintiff was injured, (App. 132, 133, Witness Beale,—App. 93, 94, Witness Knox,—App. 107, Witness Bray).

The evidence of record further shows that the defendant also had in use in its store, at the time the infant plaintiff was injured, but not at the time the other little child was injured, a newer type escalator, installed by it, from the 3rd, on up to the 7th floor, all installed by the defendant, subsequent to the one causing the infant plaintiff's injury and the one causing the other little child's injury, (Witness Knox, customer relations manager of defendant,—called as witness by plaintiffs, App. 92-97 and App. 101-103 and 103-104) and (Witness Bray, chief engineer of defendant,—called as a witness by plaintiffs, App. 104-108 and 115-119). From an examination of the photographs of the old type, causing the plaintiff's and the other child's injuries, and the newer type, introduced in evidence by the plaintiff (old type as Plaintiffs' Exhibits Nos. 3, 4 and 5, App. 34 & 35—filed with record) and (newer type as Plaintiffs' Exhibits Nos. 6 and 7, App. 50, 101, 102 & 103,—filed with record), it is readily apparent and easily observed by a mere comparison of the two types that there is less space between the escalator step as it passes the comb plate and disappears under the floor, in the newer type, than in the older type, of which the defendant necessarily had knowledge, because, as stated, both were in use in the defendant's store at the time the infant plaintiff was injured on November 15, 1945, and which accentuated and demonstrated to the defendant the inherent danger in the old type escalator which caused the infant plaintiff's injury, and thus the defendant had knowledge of the danger, namely, the dangerous way in which it was constructed, insofar as the use

thereof, by children, was concerned, and the infant plaintiff and her mother did not. In other words the difference between the two shows that the newer type is safer for use particularly by children of tender years. This was known by the defendant by its mere comparison of the two when the new installation was installed by it, and, therefore, the photographs of the new model were admissible in evidence, going directly to the defendant's knowledge of the danger, particularly to children, because the use of the old model was dangerous and less safe, whereas the use of the new model was not dangerous and more safe. We think, this evidence was admissible, because, as stated, it went directly to the defendant's knowledge of the danger, and this, we also think, would be true whether the highest degree of care or ordinary care applied, and was a competent piece of evidence for the jury to consider along with all the other evidence disclosed by the record on the question of the defendant's knowledge of the danger involved. Certainly, the defendant should not be heard to complain when the evidence showed that the defendant was making use of both models notwithstanding the fact that it knew that another child, about the same age as the infant plaintiff, had been injured in the same way, by the same defect, as the infant plaintiff, on a prior occasion, at the first floor level, and before the defendant installed the new model.

In addition, the defendant, in its answer, alleged that the escalator which caused the infant plaintiff's injuries, maintained by it, "was in a safe and proper condition, * * * and that it is of the usual and approved type of such escalator generally in use", (App. 6). As stated, a mere comparison of the new model with the old, proved conclusively to the naked eye that the old model was not safe and that it was not the usual approved type of escalator generally in use, because the new model was safer and was in general use in defendant's own store, and had been since September, 1941,

(App. 132 & 133—93 & 94,—107—App. 175 & 176,—testimony, Witness Ray, District of Columbia elevator inspector, called by defendant). If the new model was not dangerous and was safer for use by children than the old model, then the old model was not safe and was a relevant factor to be considered by the jury in determining whether the defendant was or was not negligent. It also served as another reason why the jury should be permitted to view the defendant's premises and see with their own eyes both models. This the plaintiff, requested of the court, be done, although the defendant objected to such view, which was properly overruled by the court, and the jury were taken to defendant's store for that purpose (App. 162, 163, 164, 199 & 200), so that the jury had the benefit of photographs of both models and also a view of both models, and all of which was proper because both related to the issues on knowledge of danger.

This evidence was admissible because it had a direct bearing on the final question involved in the case, namely, the dangerous construction of the old model which caused the infant plaintiff's injuries, because it had to do with the space, opening, or aperture between the escalator step and the comb plate where the infant plaintiff's fingers and hand were caught and showed that there was more space between the step and comb plate of the old model than between the step and comb plate of the new model, and therefore, was a relevant factor for the jury to consider on the question of whether or not the old model, causing the injury to infant plaintiff, was safe, and also on the question as to the defendant's knowledge of the danger, namely, the defective and dangerous construction of the old model. The evidence showed that there was less space between the step and comb plate of the new model than between the step and comb plate of the old model, thus less hazard, (App. 93 & 94—App. 176—Defendant's Witness Ray, on cross examination,

—re hazard on redirect examination, App. 178 & 179 re recross-examination App. 179), which gave rise to a question of fact for the jury to decide as to whether the old model was defective and constructed in a dangerous manner, the opening in which it was conclusively proved, and not denied, that the infant plaintiff's fingers and hand were caught (Defense Witness Lewis, App. 191, 192 & 193,—Defense Witness Fauer, App. 196) and also for the jury to consider and say whether a child's hand could get caught in the opening between the step and comb plate of the new model, in determining whether a "person exercising the highest degree of care, skill and foresight within reason for the safe carriage of his passengers would supplant the old installation with the new and would not continue to use the old installation because of the hazards to its passengers", in accordance with defendant's requested Instruction No. 4, which was granted by the trial court (appearing at pages 16 & 206 of the Appendix). The trial court had ruled, out of the presence of the jury, that this matter was a question for the jury to decide (App. 100 & 101). The trial court in its charge to the jury, included Defendant's Instruction No. 4, by reading said Instruction to the jury, and in doing so instructed the jury that this was a matter for their determination, when in its charge it instructed the jury (Defendant's Instruction No. 4, appearing in the court's charge to the jury at page 221 of the Appendix), as follows:

"The jury are further instructed as a matter of law that the failure or omission of the defendant to install the more modern or up-to-date escalator when the same came on the market is not of itself an act of negligence, unless it appears from a fair preponderance of the evidence that the person exercising the highest degree of care, skill and foresight within reason for the safe carriage of his passengers would supplant the old installation with the new and would not continue to use the old installation because of the hazards to its passengers."

(No objection was made by counsel for the defendant to the court's entire charge (App. 226 & 227).)

The Witness Ray, District of Columbia elevator inspector, called as a witness by the defendant, also testified (App. 176), that neither the accident involving the infant plaintiff, occurring November 15, 1945, or the accident to the other little child, occurring in 1938, were reported to the District of Columbia authorities, although the defendant was supposed to report accidents.

We think, the reasons already given under this point are sufficient to show that the photographs of the newer model escalators installed by the defendant in September, 1941, and the other evidence concerning them, were and was material and relevant to the issue of negligence and knowledge of danger on the part of the defendant, and for those reasons such evidence was admissible and properly received in evidence by the trial court.

We also further maintain, that one who owns and operates passenger escalators, must keep pace with science, art and modern improvements and appliances in the maintenance and operation thereof, and that his duty to his passengers is to provide and make use of the best and most approved machinery and devices in general practical use for the safety of passengers. The evidence of record respecting the fact that the infant plaintiff was injured by the old model escalator, installed by the defendant in June, 1934, and that the defendant also had in use, in its store, before and after the accident in question, a newer and later model, installed by defendant in September, 1941, which are safer and less dangerous in their construction, maintenance and operation,—more improved, more modern,—proved that the defendant failed in his duty to the infant plaintiff in this respect.

In *Strobel v. Park*, 292 Pa. 140 Atl. 877, the court, at page 204, said:

“While it is true that the owner is not bound to furnish appliances which will make accidents impossible, and is only required to furnish those actually used by men of judgment and common prudence, yet if we assume plaintiffs’ evidence to be correct, as we must, defendant failed in his duty to passengers. When a *recognized standard of comparison (namely, other elevators)* is present, it furnishes the basis for concluding that defendant was negligent. An elevator owner must keep pace with science, art and modern improvements in appliances; his duty to his passengers is to provide and make use of the best and most approved machinery and devices in general practical use for the safety of passengers: *McKnight v. S. S. Kresge Co.*, 285 Pa. 489, 492; 10 C. J. 955; 4 R. C. L. 1204.” (Italics ours)

At page 206, the Pennsylvania court quotes from our local case of *Munsey v. Webb*, (231 U. S. 150) as follows:

“* * * The whole question comes down to whether we are prepared to say as a matter of law * * * that, in an elevator *constructed* as this was with a *special source of danger* in the shaft outside the car, to require the defendant to guard the door space in transitu, at his peril, is too strict a rule. We cannot go so far: *McDonald v. Toledo Consol. S. Ry. Co.*, 74 Fed. Rep. 104, 109.” (Italics ours)

And at pages 206 and 207, referring to construction, the Pennsylvania court again cites *Munsey v. Webb*, *supra*, when it said as follows:

“* * * The normal and *probable acts of passengers must be anticipated*. The elevator hauls the old, young, sick, infirm, cripple and blind. The owner must know that at times a passenger may suddenly collapse, move or be pushed about, or otherwise get some part of his person outside the car while it is in motion; that a feeling of sickness, dizziness, or temporary indisposition to cause this is not an uncommon experience with those who ride often in elevators; especially when the car moves swiftly. *These results are obvious and must be*

anticipated in the construction of the car; it must be so built that, if such results occur, the passenger will not be catapulted into the elevator shaft, or fall against its sides. The court did not err in submitting this question to the jury: Munsey v. Webb, supra." (Italics ours)

At page 203 the court further said:

"* * * The chief difference between this *and other elevators in the building* was that the whole front of the cage facing the floor landings were entirely open and unprotected, there being no collapsible safety gate or other protection.* * *" (Italics ours)

In the case at bar, we say that the chief difference between the escalator causing the infant plaintiff's injuries, installed June, 1934, and the other much improved (App. 103) and safer escalators in the building, installed September, 1941, both by The Otis Elevator Company, (App. 101, 103 and 105) was the space between the cleats or treads on the steps and the space between the comb plate and the steps as they disappeared under the comb plate and the floor, and that said space in the newer model, installed in 1941, was much closer together (App. 102, 107, 176) and that it is much easier for an object to get caught in the old type escalator, in said space, than it is in the new type escalator, (App. 176) and that the same would be considered a hazard (App. 179) which was unprotected, there being no cover over the same, or other protection.

In *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, the court, at page 599, said:

"It is further argued that the court erred in giving the first instruction asked by plaintiff. The instruction is as follows: 'That the defendant owed it as a duty to the persons using the elevator in their store, either as customers or by their invitation or request, to use all reasonable means and efforts to furnish good and well constructed machinery, adapted to the purpose of its use, of good material, and of the kind which

is found *to be safest when applied to use*; and while they were not required to seek and apply every new invention, they must adopt such as are found by experience to combine the greatest safety with practical use.' "

"We think this a direction that the defendants were bound to use all reasonable means and efforts to furnish good and well-constructed machinery, adapted to the purpose of its use, and all reasonable means and efforts to furnish or provide it, of good material, and of the kind that is found to be the safest when applied to use; that the kind of machinery furnished and the material furnished must be of the kind which has been found by others using it or constructing such machinery to be safest in practical use. The later portion of the instruction bears out this interpretation; it is that the defendant must adopt such inventions as are found by the experience of other persons to combine the greatest safety with practical use; yet while they are bound to do this, the law excuses them from seeking and applying every new invention. The instruction, as we understand it, is but a fair deduction from the rule that the defendants must use the utmost care and diligence to carry safely those who ride in their elevator, as far as human care and foresight will go, and while they do not engage for absolute safety, they do bind themselves and warrant that they will use the utmost care and diligence of every cautious person, as far as human care and foresight will go, to provide such means of carriage as are above pointed out."

"Like common carriers of passengers they must keep pace with science, art, and modern improvement in supplying safe obtainable vehicles, machinery, and appliances for their use. (see 2 Refield on Railways, 241, 242). *They must adopt the most improved modes of construction and machinery in known use in the business, and if they do not, and injury occur, they will be held responsible.*" (Italics ours)

In *McKnight v. S. S. Kresge Co.*, 285 Pa. 489, 132 Atl. 575, the court, at page 492, said:

"In Pennsylvania the owner of a passenger elevator is held to the highest degree of care *in the construction, maintenance and operation of its elevator in protecting*

from danger persons carried thereon. He is not an insurer of the passenger's safety but his liability for injury is similar to that of a common carrier: *Fox v. Phila.*, 208 Pa. 127; *Riland v. Hirshler*, 7 Pa. Superior Ct. 384. This rule is also adopted in other states: (citing cases). Others hold to the standard of ordinary care: (citing cases). But the doctrine in Pennsylvania is in accord with the great weight of authority: 2 L. R. A. (U. S.) 744; 16 L. R. A. (U. S.) 290, * * *. (Italics ours)

For local cases on question that highest degree of care is owed by owner and operator of an elevator respecting construction and maintenance, see:

Munsey v. Webb, 37 App. D. C. 185, Pages 187, 189, 192; 285 Fed. 62.

Munsey v. Webb, 231 U. S. 150, Pages 154, 156; 58 L. Ed. 162.

Southern Ry. Co. v. Taylor, 57 App. D. C. 21, Page 27; 16 Fed. (2nd) 517.

Goldenberg Co., Inc., v. Schicht, 65 App. D. C. 336, Page 337; 83 Fed. (2nd) 593.

This Court also said in the case of *Hellweg v. Chesapeake & Potomac Telephone Co.*, 71 App. D. C. 346, at page 449, that " * * the installation of known and approved appliances other than, and in addition to, those customarily used," was necessary, in order to provide reasonable protection from foreign currents.

See *Texas & P. R. Co. v. Behymer*, 189 U. S. 468, 470, 23 S. Ct. 622, 47 L. Ed. 905, relied upon by this Court in the *Hellweg* case, *supra*, wherein the late distinguished Mr. Justice Holmes, speaking for the Court, at page 470, said:

" * * * The charge embodies one of the commonplaces of the law. What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not * * *". (Matter was left for jury by Court, under instruction approved by S. Ct.)

The decisions cited by the defendant under this point at page 22 of the defendant's brief would seem to be in support of what the plaintiff is contending for under this point. The decisions thus cited by the defendant hold to the effect that the owner and operator of an escalator is bound to furnish an appliance the same as those *actually used by men of judgment and common prudence, and that he must make use of the best and most approved machinery and devices in general practicable use*. While, we of course think, that the defendant most certainly could not be considered a man of judgment and common prudence in the use of the 1934 model escalator which caused the infant plaintiff's injuries, we do say that the defendant used much better judgment when it installed the 1941 model, because of the differences between the two in terms of safety factors, as conclusively shown by the evidence. The jury had the full benefit of the comparative features of both by the introduction, by the plaintiff, of the photographs of both, and the view of the premises of the defendant, had by the jury, at the request of the plaintiff, at which time they were permitted to observe direct and first-hand the better safety factors of the later 1941 model and after doing so it was for the jury to decide the question of negligence, which was done by them, the result being that their verdict was in favor of plaintiffs. As far as, "*the general practical use feature*", of the decisions cited by the defendant is concerned, we think, that it goes without saying that the defendant had the later 1941 model escalator *in general practical use*, for the evidence shows that it was installed in September, 1941, and that the accident causing the infant plaintiff's injuries took place on November 15, 1945, by reason of which the later 1941 model had been *in general practical use* in the defendant's own store for a period of more than 4 years. Further, the evidence shows that both escalators were installed by The Otis Elevator Co.,

(Witness Knox on cross-examination App. 103,—Witness Bray on cross-examination App. 108) a company which is known to the general public as one of the outstanding companies, if not the outstanding company, in the manufacture of elevators and escalators, and it is, therefore, to be assumed, and an assumption, which the jury itself could have indulged in, or at least drawn a fair inference therefrom, that this company had made considerable improvement over its 1934 model as between its 1941 model, which inference, of course, was undoubtedly further strengthened and satisfied by the jury in its comparison of the two different models, which the jury had at first-hand when it viewed the defendant's premises. In addition, the evidence showed, and, it was brought out by the defendant itself, through the Witness Knox on cross-examination, that the 1941 model "*were much improved*" as compared to the 1934 model (App. 103). (*Italics ours.*)

The complaint made by the defendant to the admissibility of the evidence concerning the later 1941 model has no merit or sound basis *for the further reason*, that any right to object thereto was removed by questions on direct examination (without objection by defendant) and on cross-examination by defendant, asked the witnesses, Frederick W. Knox, customers' relations manager of defendant, and Chester M. Bray, chief engineer of the defendant, both called as witnesses by the plaintiff, and the witness, Edgar R. Ray, District of Columbia elevator inspector, called as a witness by defendant. The witness Knox testified, in part, as follows:

On direct examination (without objection), of the Witness Knox, occurred the following:

(App. 101)

"Q. Did you subsequent to that date install a different type of escalator, Mr. Knox? A. Yes, sir.

Q. You installed those in September or October—approximately September, 1941, did you not? A. I believe so.

Q. I now hand you two photographs, one just having been marked Plaintiffs' Exhibit 6, and ask you if that does not depict a close-up of the bottom of the up escalator from the third to the fourth floor? A. Well, I really don't know whether that depicts the one from the third to the fourth floor. It looks like the equipment laid out in the later installation.

(App. 102)

Q. And that being so, the space between the comb plate on the newer type and the cleat or tread of the step, the space itself on top, as it meets the comb plate is likewise less than the space between the older type, is that not so? A. Yes, sir."

Also on cross-examination of the same witness:

(App. 103)

By Mr. Canfield:

"Q. Mr. Knox, when this escalator from the second to the third floor was installed in 1934 they were all from the Otis Elevator Company, were they not? A. Yes, sir.

Q. And did the elevator company install them themselves? A. Yes, sir.

Q. When the escalators were bought in 1940 and '41 *they were much improved*; they were likewise all from the Otis Elevator Company were they not? (Italics ours.) A. Yes, sir.

Q. And this elevator company installed them themselves? A. Yes, sir.

Q. In other words whatever was done so far as the construction and installation was done by the Otis Elevator people? A. Yes, sir.

Q. And not by the Hecht Company? A. Yes, sir."

Also, on redirect examination of the same witness:

By Mr. Canfield, Defendant's counsel:

(App. 104)

"Mr. Canfield: I neglected to ask this question—are the escalators to your knowledge inspected from time to time?

The Witness: Yes, sir.

Mr. Canfield: By whom?

The Witness: By our engineer, and I believe they are inspected daily, and I believe by the District authorities—

Mr. Canfield: The District of Columbia?

The Witness: The District of Columbia authorities. I believe once a month or once every other month, I am not too certain.

Mr. Canfield: By the District?

The Witness: By the District, yes.

Mr. Canfield: Are they inspected from time to time by the Otis people, if you know?

The Witness: I believe so, however, I am not too certain."

On direct examination of the Witness Bray, called by plaintiff,—see questions (without objection) and answers, of same import and bearing, appearing on pages 105 & 107, of appendix.

Also, on cross-examination by defendant of the same Witness Bray,—see questions and answers, of same import and bearing, appearing on pages 108, 111 & 112, of appendix.

Also, on redirect examination of the Witness Bray,—see questions (without objection) and answers, of same import and bearing, appearing on pages 115, 116 & 117, of appendix.

On cross-examination of the Witness ~~Bray~~^{Ray}, called by the defendant, by plaintiffs' counsel (without objection):

(App. 175)

"Q. You have noticed, have you not, that all the elevators (escalators) from the third to the seventh floor are a more new and modern type? A. Yes, sir.

Q. You know, do you not, that they only have the two floors with this old type, the one installed in 1934, namely, from the first to the second and the second to the third, up, and the down escalators, is that right? A. That is right.

Q. You have had an opportunity to observe the two of them in making your inspections, have you not? A. Yes.

(App. 176)

Q. And the space between the treads or corrugations or the steps in the newer type that was installed in 1941 is much less as the steps meet the comb plate than the space between the older type as the steps meet the comb plate, isn't that so? A. That is so, that is right.

Q. It is much easier for an object to get caught in the old type in that space than it is in the new, is that right? A. Yes."

Also, on recross-examination of the Witness Ray by plaintiffs' counsel (without objection):

(App. 179)

"Q. If you had definite knowledge that this aperture of the 1934 installation in the Hecht Company would catch a child's hand and cut the finger off you certainly would consider that hazardous, would you not, Mr. Ray? A. Well, yes, I would consider it a hazard, but I certainly could not do anything about it after we once accept it."

In view of the above testimony, we think the action of the defendant in the above quoted and referred to testimony in effect waived the objection previously made by counsel for defendant to the evidence relating to the later 1941 model escalator, and that the defendant should, therefore, not be permitted to assert error on the basis of said objection in this Court.

"Nor are the defendants excused from the degree and diligence above pointed out (meaning highest degree of care) by the fact that the elevator in use was constructed by a competent and skilled manufacturer, from whom they purchased it. The manufacturer was their agent or servant in the construction of the elevator, and they are responsible for any want of care of the maker or builder. The obligation of care and foresight rests on the person using the ele-

vator, and he cannot shift it from himself to another person." *Treadwell v. Whittier*, 80 Cal. 574, at page 595.

The portions of the testimony quoted and referred to above, and the other references to the record made under this point proved that the later 1941 model escalator in use, (and having been in use since September, 1941) in the defendant's store, at the time the infant plaintiff sustained her injuries, on November 15, 1945, by reason of the dangerous and defective construction of the old 1934 model, also in use in the defendant's store at the same time, was more modern, more improved, safer and less dangerous than the old model, and therefore, under the authorities cited herein under this point, the evidence pertaining to the new model was admissible. We do not think, that the defendant has any sound basis for complaint in this connection because the fact is that counsel for the defendant, asked the Witness Knox, an official of the defendant, called as a witness by the plaintiff, the question that when the escalators were bought in 1940 and '41 "*they were much improved*" and they were likewise all from The Otis Elevator Co., and the said witness answered, yes, (App. 103). In addition, there is no evidence elsewhere in the record coming from the defendant to show the contrary, and certainly if the contrary were true it could have been easily shown by the defendant calling some representative of The Otis Elevator Co., as its witness, to show that it was not true. We think it is of considerable significance that this was not done by the defendant. (Italics ours)

III

The negligence of the defendant was the direct, efficient and resulting cause,—the real cause that caused the injuries to the infant plaintiff. The record does not disclose that the infant plaintiff's mother made no effort to exercise proper care and supervision over the infant plaintiff while descending on the escalator, but on the contrary, shows that she made all possible effort, under the circumstances, and exercised the ordinary care and prudence required of her under the law, and the defendant should not have had a directed verdict as a matter of law, and the question of proximate cause was for the jury to decide.

It seems to be well settled that the question of determining what is the proximate cause of an accident in a given case is generally a question of fact for a jury to determine, under proper instructions from the court. We think the question of proximate cause here was a question of fact, and not a matter of law, and should have been and consequently was for the jury to decide. In the case at bar the defendant contends "that the proximate cause of the infant plaintiff's injuries was the negligence of the mother in not keeping the infant plaintiff under proper control and supervision while descending on the escalator", (Deft's. Brief, p. 25). This is a general statement and one easy to make, but to support it by facts disclosed by the evidence of record is a horse of a different color. Let's look at the record to ascertain what the mother did on the day in question and to ascertain what the defendant was doing and what the defendant maintained and operated in its store, for the use, by invitation, of the infant plaintiff and her mother, as well as the general public, without warning of an inherent danger, although the defendant knew and had knowledge of the danger, (prior accident-App. 132, 133 & 134), and difference between old and new

models, showing danger in old model), about which the infant plaintiff and her mother knew not, while the infant plaintiff and her mother, being where they had a right to be, were, therefore, unaware of the danger, and it will be found, we think, that there is no foundation whatsoever for this contention of the defendant, and that it is totally without merit. So we proceed to the record,—the mother testified as follows: That she and her daughter, Geraldine, age seven at the time, and her younger daughter, Betty-Lynne, the infant plaintiff herein, age three years and eleven months, went to the defendant's store on November 15, 1945, to buy a brownie suit and a pair of leggings for her older daughter, and to get some underwear for her youngest daughter, (App. 54 & 55); that she arrived at the defendant's store at about 10 o'clock in the morning and went first to the second floor and then to the third floor, for the purpose of making purchases for her children and that the children visited Santa Claus on the third floor and thereafter proceeded with the children by way of the down escalator, from the third to the second floor, (App. 55) for the purpose of going to the children's department in the defendant's store, located on the second floor, to purchase some underwear for the infant plaintiff.

At this point the Court's attention is respectfully directed to the specific questions and answers appearing on pages 56, 57, 58, 59, 60 and 61, which we think, clearly demonstrate that the mother did all that was possible, under the circumstances, for her child, the infant plaintiff herein, and shows that she exercised the ordinary care and prudence required under the law, the same as any other careful and prudent mother would have done under similar circumstances. This position we take, with respect to the mother's testimony, was not changed in the cross-examination of her by the defendant (App. 71-92). Even when the witness was pressed by counsel for defendant respect-

ing her knowledge of any danger, she stated that she had no knowledge of danger and gave her reasons which are believable and plausible (App. 72, 73, 74 & 75).

From the testimony of the mother, we think, it is clear that she acted on the day in question like any other ordinary careful and prudent mother would have acted and that she was guilty of no wrong and not negligent, but that it was the negligence of the defendant which caused the injuries to the infant plaintiff. Is a mother to be charged with negligence merely because her child suddenly and impulsively pulls her hand free from her mother's grip, without warning to the mother or without fault of the mother, as the evidence of record conclusively shows? There is no evidence of record that the mother did not make every effort to hold the infant plaintiff's hand as she got on the escalator,—the defendant produced no such evidence. No witness or evidence was produced by the defendant that contradicted the mother in any way as to what she did and the infant plaintiff did, or as to how the accident happened. Further, there is no evidence that the mother made no effort to pursue the infant plaintiff as she pulled her hand free, but there is evidence that the mother actually did both (App. 56 & 57). The evidence further showed that at the moment, just before, and at the time, the infant plaintiff's fingers and hand were caught in the escalator, that there was nothing the mother could have done to have prevented the infant plaintiff from catching her fingers and hand in the escalator,—the situation at that moment being entirely beyond her control (App. 56 & 57), hence how can it be claimed that she was negligent at all. Whereas, on the other hand, the evidence shows that if it were not for the dangerous construction of the escalator, the fingers and hand of the infant plaintiff could and would not have been caught. As a matter of fact the same injuries could have been incurred by the infant plain-

tiff had the mother been standing alongside of her holding her hand and she fell, the exact same thing that happened in the case of *Reynolds v. May Dept. Stores Co.*, 127 Fed. (2nd) 396, hereinafter cited, whereas, here, if not for the opening or dangerous condition of the escalator, in which the fingers and hand were caught, the injuries could not have been sustained. The conclusion that the mere fact that the infant plaintiff's hand was disengaged from the mother's hand, the mother must be at fault, which the defendant would have one reach and believe, we think, is but surmise and most certainly is not evidence. Some direct and affirmative evidence would have to be produced to show some fault on the part of the mother and such evidence is totally lacking in the case at bar. The law does not hold a person at fault on such false premise, particularly where there is direct and affirmative evidence to show otherwise, with no direct or affirmative evidence contradicting it.

What does the record disclose as to the defendants' duties and responsibilities to the infant plaintiff, with reference to the construction, maintenance and operation of the escalator on the day in question? The plaintiffs' actions are based on the negligence of the defendant in using the escalator in its dangerously constructed condition, particularly with reference to children, in not properly supervising the operation thereof and in the running and operating of the escalator, in that the escalator was in operation and that it was so constructed that there was an opening in which infant plaintiff's fingers and hand could get caught, in consequence of which the infant plaintiff, without any fault or negligence on her part, received the injuries of which she complains (App. 56, 57, 58, 59 and 60). The record shows: (1) That the defendant failed to protect or cover the moving and exposed part of said escalator, at the points or places where the fingers and hand of the

infant plaintiff could be caught or inserted and injured, namely, the opening at the comb plate and moving step or steps, when, by the exercise of the care required of the defendant under the law, such parts or openings could have been protected or covered (photographs, Plaintiffs' Exhibits Nos. 3, 4 & 5,—filed with record) and (view of premises, App. 200); (2) the failure of the defendant to protect or cover the moving and exposed parts and openings of said escalator at the points or places where the fingers and hand of the infant plaintiff could be caught or inserted and injured, created a dangerous condition which the defendant already had full knowledge of by a prior and similar accident (App. 132, 133 & 134); (3) that the defendant negligently invited infant plaintiff into its store when it knew that she might be injured by the dangerous condition of said escalator, as heretofore stated (testimony of Mrs. Jacobsen, Knox, Bray, Beale, App. 54 & 55—93, 94, 102 & 103—107—132, 133 & 134); (4) that defendant, its agents and servants, failed to warn infant plaintiff of the dangerous condition of said escalator when it had full knowledge thereof and could have done so (App. 95, 97, 106, 132, 133 & 134—testimony of Knox, Bray, Beale); (5) that defendant carelessly and negligently permitted said escalator to be and remain unguarded at the time and place infant plaintiff's injuries were incurred; (6) that defendant permitted said escalator to remain in a dangerous condition when it knew and had full knowledge of the danger; (7) the failure of the defendant to provide attendants at either end of the escalator (App. 106), to assist, caution or give directions to infant plaintiff as to the proper position to be taken on the escalator, the preserving of her balance, and the avoiding of any effort to press forward as the escalator neared the second floor, in its descent from the third floor, when said defendant knew of the existing dangerous mechanical condition, particularly with refer-

ence to children, the age of the infant plaintiff, by reason of the prior similar accident in its store. From this evidence we think, that it is both obvious and inescapable that the defendant not only created the dangerous condition but thereafter maintained it and permitted it to continue, even after a similar accident to another child had happened, as a result of which the defendant well knew the precise danger to children. The defendant knew that the point at which the moving step entered the second floor, where the infant plaintiff was injured, was the point of greatest danger, and yet, from the evidence, defendant provided no protection at this point to prevent the happening of just such an accident as the one involved in the case at bar.

In the research required for the preparation of this brief, no case is recalled wherein evidence of a prior accident showing knowledge on the part of defendant, of the precise danger involved, was introduced by a plaintiff, which, we say, caused the injury complained of, as we have in the case at bar, with the single exception of the mention thereof in the case of *Reynolds v. May Dept. Stores Co.*, 127 Fed. (2nd) 396, hereinafter cited.

For illustrative cases on the question of proximate cause, we need go no further than our local case of *Munsey v. Webb*, *supra*, 37 App. D. C. 185, which was, as previously stated herein, affirmed by the Supreme Court of the United States, 231 U. S. 150. In the *Munsey* case, *supra*, a number of leading United States Supreme Court cases are collected in the able opinion by Judge Van Orsdel, to which we respectfully invite the attention of this Court. The reasoning laid down in the *Munsey* case and cases cited therein is, by reference, relied upon by the plaintiffs as though citations therefrom were actually cited herein. In the opinion rendered in the *Munsey* case, this Court, in passing on the question of proximate cause at page 189, said:

"In general the law looks to the proximate, and not to the remote, cause of the accident. The facts must constitute a succession of events so connected as to make an entire whole, without any new intervening cause. The proximate cause may not be the immediate, antecedent cause. It is sufficient if it sets in motion a series of events which terminate in the accident. Of course, the wrong and the injury must not be separated by an independent cause. In that event, not the original wrong, but the intervening act, would be the proximate cause. The intermediate cause, however, must be self-operating and disconnected from the primary wrong. What were the causes that produced the injury in this case? It was not alone the falling of the deceased,—that was merely the incident which exposed in bold relief the negligent manner in which the elevator was constructed and operated,—but the projecting floors, in connection with the open door of the car when the car was in motion, furnished a situation that might subject passengers to the danger of being injured in various ways and under numerous circumstances. The mere fact that a dangerous condition existed was sufficient to charge defendant with knowledge of the probability of a passenger's getting caught between the projecting floors and the floor of the ascending car.

"It may be conceded that the falling of the deceased was the immediate cause of the accident, but it formed only the connecting link between the injury and the negligence of defendant. If the door of the car had not been open, a condition which existed only because of the negligence of defendant, the injury could not have been inflicted. It therefore follows that if, technically speaking, the negligence of defendant was not the efficient cause, it was the cause but for the existence of which the accident could not have happened. Whether or not the causal connection between the negligence of defendant and the accident was sufficient to establish defendant's negligence as the proximate cause of the injury, was a question of fact for the jury, which has been by the verdict resolved in favor of the plaintiff. This rule as to the proximate cause is supported by the highest authority."

Continuing at page 192, the Court said:

“In the case of an elevator, the safety of the passengers is dependent entirely upon its proper construction and operation. * * * It is sufficient answer that if the car door had been closed it is highly improbable that the deceased would have been injured; and had injury resulted from his fall, it could not then have been imputed to the cause that here exists. The open car door was the occasional cause, without which the accident could not have happened. We are unable to distinguish this case from the cases cited. * * * ‘and if the elevator car door had not been left open, the deceased would not have suffered the injuries he did. In each of these cases it was for the jury to say whether, had the particular act of negligence designated not existed, it would have prevented the accident.’ ”

We say, that if the space or opening between the comb plate and moving steps, as they disappear under the floor, had not been left open, by either guarding or covering it, or by other means to prevent the child passengers from being injured, by reason thereof, or by use of an escalator so constructed as to not leave such space or opening, the infant plaintiff would not have suffered the injuries she did.

Quotations from the opinion of the *Munsey* case, *supra*, of the Supreme Court, in its affirmance of this Court in that case, have already been quoted herein, under Point I, having to do with the application of the highest degree of care. Those same quotations are adopted and relied upon by plaintiffs under this point, as though actually quoted hereunder.

In principle we are unable to see any difference between the *Munsey* case and the case at bar. There the plaintiff collapsed and fell, and was in the state of unconsciousness before his injury and therefore was not conscious of the danger involved. Here, the infant plaintiff was not quite 4 years of age and too young to comprehend the attendant

danger and consequently not conscious of the danger involved. We think, the same reasons given in the *Munsey* case, *supra*, in holding that the defendant's negligence was the proximate cause of the plaintiff's injuries, applies with equal force to the case at bar and completely supports, as the evidence does in the case at bar, the plaintiffs' contention that the defendant's negligence was the proximate cause of the infant plaintiff's injuries,—that her injuries were sustained as a direct and proximate result of the negligence of the defendant, without which the accident could not have happened.

In the case of *Kataoka v. May Dept. Stores Co.*, *supra*, 60 Cal. App. (2nd) 179, 140 Pa. (2nd) 467, factually the same as the case at bar insofar as the infant plaintiff's (boy 4 years old) fingers and hand were caught in identically the same place, as the fingers and hand of the infant plaintiff herein, namely, between the comb plate and moving step or steps of the escalator, although different from the standpoint that the injured plaintiff was not a passenger at the time of his injury, but who was a business invitee of the defendant, in defendant's store, with his mother, the latter of whom permitted him to walk around her at a distance of about fifteen feet from her, while she was in the defendant's store (children's wear department) for the purpose of exchanging a suit bought for another of her children, taking plaintiff with her, (pages 179 & 180) the court in dealing with the cause of the plaintiff's injuries, at page 188, after holding that both the "attractive nuisance doctrine" (page 185) and the "doctrine of *res ipsa loquitur*" did not apply, but that the rule of care proportioned to the danger involved (page 182) and under that rule the defendant should be held, because of the circumstances disclosed by the record, to the applicable rule of that "requiring ordinary care to make the premises safe for invitees, as qualified by the further rule that where the

invitees are children special caution is necessary", the court, page 188, said:

"Here the evidence clearly establishes the immediate cause of the plaintiff's accident. It resulted from the facts that the escalator was in operation and *that it was so constructed that there was an opening in which plaintiff's fingers could get caught*. It did not result from anything about the operation of the escalator, such as the sudden jars or jolts which the operators of moving vehicles have been required, under this doctrine, (meaning *res ipsa loquitur* doctrine) to explain. Whether defendant corporation was to be held liable for the injuries thus caused depended on the consideration of matters which were as open to investigation by one party as by the other. Since we hold, that an inference of the corporation's negligence was possible without the application of this rule, this point is perhaps not of importance to the present decision; but we determine it for the purpose of a new trial, to guide the trial court in its instructions to the jury, or its own consideration of the case if there be no jury" (Italics ours).

With reference to the mother's negligence, the court continued:

"Defendants contend that plaintiff's mother was guilty of contributory negligence in failing to keep proper watch over plaintiff and to prevent him from getting caught in the escalator. As defendants concede, such negligence would not bar plaintiff Takashi's action for his own injuries (*Zarzana v. Neve Drug Co.*, (1919) 180 Cal. 32, 37 [179 P. 203, 15 A. L. R. 401], and it was not pleaded as a defense thereto; but defendants argue that any recovery by plaintiff Tsutomu (father) would be community property of himself and his wife, the mother of the other plaintiff, and hence her contributory negligence would constitute a defense to Tsutomu's action. It is true that negligence of the wife, if any, in caring for the children of herself and her husband is imputable to the husband and is a defense to any action brought by him in behalf of the community to recover for injuries to the children, to which such negligence contributed. (*Dull v. Atchison T. & S. F. Ry. Co.*, (1928) 27 Cal. App. 2d 473, 479 [81

P. 2d 158].) *But from the evidence it appears that the wife took some precautions by way of watching over and caring for the son, and we cannot say, as a matter of law, that they were not sufficient. The question was one for the jury. (See Healy v. Market St. Ry. Co., (1940) 41 Cal. App. 2d 733, 738 [107 P. 2d 488]; Carrisosa v. Southern Service Co., (1932) 128 Cal. App. 160, 163-165, 16 P. 2d 1032.)*" (Italics ours.)

The trial court, in the *Kataoka* case, *supra*, had directed a verdict for the defendants and appellate court held that: "The judgment in favor of defendant Goddard (Floor manager of defendant May Dept. Stores) is affirmed. The judgment in favor of defendant May Department Stores is reversed and the cause is remanded for a new trial as to that defendant."

Note: "Respondent's petition for a hearing by the Supreme Court (of California) was denied October 6, 1943."

For the reasons given by the court in the *Kataoka* case, *supra*, as to the cause of the plaintiff's injuries, we think, the same applies with equal force to the facts in the case at bar in determining the proximate cause of the infant plaintiff's injuries. As to cause of injury, we think, the *Kataoka* case, is on all fours with the case at bar, and that the evidence of record herein clearly establishes that it was the defendant's negligence which was the proximate cause of the infant plaintiff's injuries herein. It is, we also think, a complete answer to the fact that the trial court properly overruled the defendant's motion for directed verdict and that the defendant's contention to the contrary has no foundation because it is not supported by the evidence of record.

In *Crane v. Smith*, 23 Cal. (2nd) 288, 144 Pa. (2nd) 356, at page 364, the court said:

"The appellant also contends that, when a child is accompanied by a parent and is in the latter's custody and control, the duty to keep the child from harm is

upon the parent and may not be shifted to the store-keeper. It is true that the negligence of Mrs. Crane, if any, in caring for Janice is imputable to the father and is a defense to his action in behalf of the community to recover for injuries to which such negligence contributed. *Kataoka v. May Dept. Stores Co.*, *supra*, 60 Cal. App. 2d, page 189, 140 P. 2d 467; *Dull v. Atchison T. & S. Ry. Co.*, 27 Cal. App. 2d 473, 479, 81 P. 2d 158. Any want of due care upon the part of a parent, however, does not excuse the negligence of the proprietor in failing to take proper precautions for the safety of children whom he has expressly or impliedly invited upon the premises, so far as the children are concerned, and therefore would not bar the minor plaintiff's action for its own injuries. *Zarzana v. Neve Drug Co.*, *supra*, 60 Cal. 32, 37, 179 P. 203, 15 A. L. R. 401; *Kataoka v. May Dept. Stores Co.*, *supra*, 60 Cal. App. 2d page 188, 140 P. 2d 467. And since Janice was too young to be guilty of contributory negligence, the appellant's liability to her is established. *Gonzales v. Davis*, 197 Cal. 256, 240 P. 16; *Hillerbrand v. May Mercantile Co.*, *supra*, 141 Mo. App. pages 132, 133, 121 S. W. 326."

"Even with respect to the respondent Bruce Crane's action, it may not be said that, as a matter of law, Mrs. Crane was guilty of negligence contributing to the injury to Janice. Mrs. Crane did not see Janice put her finger in the coffee mill; she was watching the clerk weigh her purchase. There is nothing to show that she knew, or had any reason to believe, that the machine would not be adequately equipped for the protection of children. And the question of her negligence was one for the trier of facts, who decided it in her favor. *Kataoka v. May Dept. Stores Co.*, *supra*, 60 Cal. App. 2d page 189, 140 P. 2d 467."

In the case at bar, Mrs. Jacobsen, at the moment Betty-Lynne (infant plaintiff) put her hand down to help herself up and it was caught between the comb plate and moving step, was not near enough to her to be able to do anything about it (App. 56 & 57). Furthermore, the evidence shows that she did not know that her child's finger and hand could get caught between the comb plate and moving step, or had

any reason to believe that the escalator was not adequately equipped and safely constructed for the protection of children (App. 73, 74 & 75). Moreover, the question of her negligence, if any, was, we think, "one for the trier of facts, who decided it in her favor".

In the *Crane v. Smith* case, *supra*, lest counsel for defendant may be concerned, recovery was not sought under the doctrine of attractive nuisance nor was it attempted to be invoked, but recovery was had upon the ground that the child was an invitee, lawfully upon the premises, and not a trespasser, which the court held (page 363) was a legally sound position.

In *Reynolds v. May Dept. Stores Co.*, 127 Fed. (2nd) 396, another case where a boy 4 years old, with his mother in the defendant's store, had his third finger of his right hand sheared off, by being caught, in an up escalator, between the comb plate and moving step, while a passenger with his mother, on said escalator, and where again the trial court directed a verdict in favor of the defendant, but which was reversed by the Circuit Court of Appeals, Eighth Circuit, the appellate court, held that if the operator of an escalator in defendant's store in Missouri created dangers to children, whether as a carrier of passengers or as an attractive nuisance, defendant owed the duty of exercising such care as would reasonably protect children against probable dangers of either relationship, and in so holding, also held that in such a situation (one similar factually to the case at bar) the question of proximate cause was for a jury to decide. With reference to proximate cause the court, at page 397, said:

"In this situation, we think it was for a jury to say whether defendant had exercised the degree of care which the law imposed upon it for plaintiff's safety, when it invited him to use the escalator, with its existing mechanical construction, its lack of useable sup-

portive handrails, and its unsupervised operation, and whether, if it found that defendant had failed to exercise the proper degree of care, this could be said to have been *the proximate cause of plaintiff's injuries*. This conclusion is further compelled by the holding and implications in *Graves v. May Department Stores Co.*, Mo. App. 153 S. W. 2d 778, and *Jablonski v. May Department Stores Co.*, Mo. App., 153 S. W. 2d 786, which have been decided by the Missouri Courts since the present case was tried in the District Court."

"In each of the two cases cited, the action similarly was one for injuries sustained by an infant in connection with the comb plate of an escalator, which is admitted in the briefs here to have been identical in construction and operation with that involved in this case. *The accidents in fact occurred in the same store as that which is involved in this case.* The court held in each instance that, whether the defendant had exercised the necessary care to avoid the accident and, if it had not, whether its negligence *was the proximate cause of the injuries were questions that should be submitted to the jury for determination.*"

"* * * If the operation of the escalator *created dangers to children*, whether as a carrier of passengers or as an attractive nuisance, defendant owed the legal duty of exercising such care as would reasonably protect against probable dangers of either relationship. Where the evidence was such as to suggest that other practical measures of protection might possibly have been taken in the particular relationship, or to permit a *sound doubt as to whether, if no other reasonable measures were possible, the infant ought at all to have been invited or allowed to be exposed to the hazard*, the questions, with equal reason in either case, would have to be regarded as matters *for jury determination.* * * *" (Italics ours)

The *Reynolds* case, *supra*, was retried and a verdict was returned for the plaintiff. The judgment was again appealed from by the defendant May Department Stores Co., and the Circuit Court of Appeals, Eighth Circuit affirmed the judgment for plaintiff, in *May Department Stores Co. v. Reynolds*, 140 Fed. (2nd) 799, and furthermore in the

first case, *Reynolds v. May Department Stores Co.*, 127 Fed. (2nd) 396, cited above, certiorari was applied for, but denied, 317 U. S. 639, 63 S. Ct. 31.

In the second appeal of the *Reynolds* case, *supra*, 140 Fed. (2nd) 799, Circuit Judge Sanborn, speaking for the court, at page 800, said:

"This court ruled, in substance, in its opinion on the first appeal, that, under the law of Missouri, it was for the jury to determine whether this escalator, *constructed and operated as it was* at the time of the accident, was a safe instrumentality for the use of this four year old boy attended by his mother, and whether, in permitting its use by the plaintiff, the defendant had exercised toward him care commensurate with the risk to which he was subjected. The argument which defendant makes to us about the inadequacy of the evidence to justify a finding of negligence should have been, and doubtless was, made to the jury at the trial." (See opinion for court's discussion of the facts.) (Italics ours.)

We think, that the two appeals in the *Reynolds* case, above cited, as they relate to the cause and effect, namely, proximate cause, are directly in point with that question being considered under this head. We think also, that it is of considerable significance that the same Circuit Court of appeals on two occasions ruled that it was for a jury to decide, and that after the first appeal the defendant applied for certiorari to the Supreme Court of the United States, which was denied by that Court (317 U. S. 639, 63 S. Ct. 31), and further, that after the first appeal in which the Circuit Court of Appeals reversed the lower court, the case was thereafter tried by a jury which found that the defendant was negligent and at fault and rendered its verdict for the plaintiff, which was affirmed in the second appeal. The facts respecting the cause and effect namely, that the child in the *Reynolds* case and the child here, both had their fingers and hand caught in the space

or opening between the comb plate and the moving steps, is identical, the only difference being that the child in the *Reynolds* case was a passenger on an ascending escalator, whereas the child here was a passenger on a descending escalator. It is also very significant that in the *Reynolds* case the mother had hold of the 4 year old boy's hand, as they stood together on one of the ascending steps or treads, and as they neared the top of the escalator she prepared to assist him to get off by putting her hand under his arm, but nevertheless at this instant he fell forward with his hands outstretched in front of him, with the result that his fingers became caught between the teeth of the comb plate and the top of the escalator steps which moved under it, so that even though the mother was holding the child's hand, and assisting and caring for the child, (the complaint of the defendant here being that the mother was not) the third finger of his right hand was sheared off, notwithstanding the care and assistance being given by the mother for the very same reason that the infant plaintiff's little finger was sheared off and the back of her hand mutilated, mangled and maimed for life (see photographs of infant plaintiff's hand, Plaintiff's Exhibits 1 & 2,—filed with record) in the case at bar, although her mother was not near her at the time (for the reasons shown by the record and already mentioned herein), namely, the dangerous construction of the escalator by reason of the space or opening between the comb plate and the moving steps, left unguarded and uncovered, and with no other means provided by the defendant, at the time, to prevent children passengers from being injured by reason thereof. This, we say, serves to clearly demonstrate and illustrate, as well as to clinch, the negligence of the defendant in both cases. In the *Reynolds* case the Court twice said that it was a question for the jury to decide and here the trial court has said the same thing, and yet the defendant says

that the trial court erred in so doing, which, we think, for these reasons was a correct ruling and that to have ruled otherwise would have been error. In addition, the jury in the *Reynolds* case and the jury in the instant case, both found that the defendant was negligent and that the plaintiffs should recover. Furthermore, we think, that some weight is added to the plaintiffs' contention in this connection by reason of the United States Supreme Court's denial of certiorari in the first appeal of the *Reynolds* case.

For the above reasons and in view of the principles of law announced in the authorities cited under this head, which we think, support these reasons in every respect, the question of proximate cause was properly submitted to the jury by the trial court, to decide. In addition, the mother's sole negligence, if any; the mother's contributory negligence, if any, as well as the infant plaintiff's contributory negligence, if any, along with the defendant's negligence, if any, were all submitted to the jury, under full and complete and proper instructions by the trial court, to which defendant took no exception (court's charge to jury, App. 214-227), and the jury rendered its verdict in favor of both the infant plaintiff and the plaintiff father. The questions involved were obviously questions of fact and not matters of law, and, therefore, should have been decided by the jury, and were submitted to the jury, by the trial court, under accurate instructions. The instructions of the court on all phases was based upon the evidence, and did not go beyond the scope of the evidence, and correctly declared the law applicable to the facts in evidence. The trial court carefully outlined the issues between ^{the} parties and defined and explained the legal principles involved, to which defendant took no exception (App. 226 & 227).

Furthermore, the instructions of the court embodied the principles of law laid down in the *Munsey v. Webb* case,

supra, by this Court, and other cases in this jurisdiction following that case, which was controlling, and we think, that the Court did not err in doing so, but to have done otherwise would have been contrary to the great weight of authority and the decisions of this jurisdiction. Moreover, to have decided these questions as a matter of law, would have unduly restricted the power of the jury in this case to decide questions of fact. In this connection it was said by the Supreme Court of the United States in the recent case of *Jesionowski v. Boston and Maine Co.*, 329 U. S. 452, 91 L. Ed. 416, 67 S. Ct. 401, at page 457, as follows:

“* * * This viewpoint unduly restricts the power of juries to decide questions of fact and in this case the jury’s right to draw inferences from evidence and the sufficiency of that evidence to support a verdict are Federal questions.”

For cases on question of proximate cause, see also the following:

Milwaukee & St. R. R. Co. v. Kellogg, 94 U. S. 269, 24 L. Ed. 256.

Choctaw, O. & G. R. Co. v. Holloway, 191 U. S. 334, 48 L. Ed. 207, 24 Sup. Ct. Rep. 102.

Hayes v. Michigan C. R. Co., 111 U. S. 228, 241, 28 L. Ed. 410, 415 Sup. Ct. Rep. 369.

McDonald v. Toledo Consol. Street R. Co., 20 C. C. A. 322, 43 U. S. S. App. 79, 74 Fed. 104.

Washington & Georgetown R. R. Co. v. Hickey, 166 U. S. 521.

Graves v. May Department Stores Co., 153 S. W. (2nd) 778.

Jablonski v. May Department Stores Co., 153 S. W. (2nd) 786.

Kryger v. Panaszy (Dec. 9, 1937), 123 Conn. 353, 195 A. 795.

IV

It was not error for the trial court to have permitted evidence of a previous accident on the escalator located between the first and second floor of defendant's store because there was proof that the prior accident was similar and that the cause of injury was identical.

The objection of defendant to the introduction of evidence of prior accident in defendant's store involving a child (approximately 3 yrs. old. App. 132) about the same age as the infant plaintiff, (not quite 4 yrs. old) and which involved the down escalator from the second to the first or main floor in defendant's store, was properly overruled by the trial court, because the evidence with respect thereto showed that the prior accident was similar and that the thing which caused the injury was not only similar, but identical, namely, the space or opening between the comb plate and moving steps of the escalators, and that the injury was the same,—injury to fingers and hand. (Witness Beale's testimony, App. 132, 133, 134;—Witness Mrs. Jacobsen's testimony, App. 57, 58). The evidence further showed that the two escalators causing the injuries in both the prior accident and the instant accident were identically the same kind, make and model, namely, the 1934 model operated in defendant's store, both down escalators, the one in the prior accident being the down escalator from the second to the first floor and the one in the instant accident being the down escalator from the third to the second floor (App. 132, 133, Witness Beale; App. 56, Witness Mrs. Jacobsen; App. 93, 94, 193, Witness Knox, defendant's customer relations' manager called by plaintiffs before Witness Beale was called to lay proper foundation, showing similarity, for reception of later evidence, by Witness Beale, of prior accident and—

App. 105, 106, 107, 108, Witness Bray, defendant's chief engineer called by plaintiffs for same reason). The evidence further showed that the escalators were identically the same in construction, movement of steps, space between steps and comb plate, and operation (App. 93, 94, 95, Witness Knox; App. 106, 107, Witness Bray) and that the location or point, at which the child in prior accident and infant plaintiff were injured, on the escalator was the same (App. 133, Witness Beale; App. 57, 58, Witness Mrs. Jacobsen). In view of this affirmative, positive, and conclusive evidence, we think, it is sufficient to say that the argument made by defendant, under this point, is not supported by the record.

Furthermore, there was no controverting evidence offered on behalf of defendant disputing the manner in which the infant plaintiff was injured or the portion of the escalator that injured her, (but in fact evidence from witnesses called by defendant, supporting same,—App. 191, 192, 193, & 196), or the child in the prior accident, although the evidence showed, through the witness Beale, called by the plaintiffs, who was an eyewitness to the prior accident that a Mr. Jack Katz, floor manager of the defendant, Mr. Bray, chief engineer of the defendant, and a nurse of the defendant, were present in defendant's store at the time of the prior accident, and none of whom were called as witnesses, by the defendant, in the case at bar. We think, it is of considerable significance that no one of these employees of the defendant were called by the defendant as witnesses having knowledge of this prior accident.

It is the settled law that evidence of similar accidents under the same or similar circumstances prior to the accident and injury in question, as we have here, is admissible, along with other evidence, as tending to show the dangerous character of the defect in question.

Meyers v. Capital Transit Co.,
75 U. S. App. D. C. 257, 126 Fed. (2nd) 232. *Re*: Frequent accidents occurring at point where plaintiff passenger alighted from defendant's street car, being admissible.

District of Columbia v. Armes,
107 U. S. 519, see Page 524,—injury occurred as the result of a defective sidewalk and on the trial a policeman was offered as a witness to testify that while he was on that beat "other accidents had happened at that place". The Court allowed the question against the objection of the city's counsel for the purpose of showing the condition of the street and the liability of other persons to fall there.

Domer v. District of Columbia,
21 App. D. C. 284. (Obstruction in highway—directed verdict for defendant reversed).

District of Columbia v. Duryee,
29 App. D. C. 327 (fall over hitching post planted on corner at 21st & K Sts., N. W., (1902)).

City of Chicago v. Powers,
42 Ill. 169, cited by S. Ct. of U. S. at Page 525, in *Armes* case (plaintiff was drowned).

Tager v. Sullivan, 113 Conn. 417, 155 Atl. 704.

In the case at bar the trial court made a determination as to whether the circumstances involved, in the prior accident, were substantially similar to those involved in the case at bar, by way of a preliminary examination of the witness Beale, who was subjected to both direct and cross-examination out of the presence of the jury (App. 120 to 132), at the conclusion of which the trial court ruled that the evidence was admissible, and said witness testified to same effect before ~~the~~ jury. Such a ruling thus made will not be found erroneous, by an appellate court, unless clearly and manifestly so. *Kryger v. Panaszy*, 123 Conn. 353, 195 Atl. 795. There, the court, at page 360, quoting approvingly from other Connecticut cases quoted as follows:

“ ‘The principle is well settled that where the admissibility of evidence depends upon a preliminary question of fact, to be tried by the court, its decision is not to be reversed unless in a case of clear and manifest error’ ”. *Williams v. Perrota*, 95 Conn. 529, 533, 111 Atl. 843; *State v. Willis*, 71 Conn. 293, 313, 41 Atl. 830.

V

The court below should not have granted a new trial or in the alternative ordered a remittitur because the damages are not excessive, and are consistent with the evidence and were not awarded as a result of sympathy, passion and prejudice.

This same request was made by the defendant in the motion for new trial, filed by it in the court below, and for the same reasons and the trial court overruled the motion for new trial and refused to order any remittitur. It seems to be well settled that when this is done an appellate court will not interfere, except to prevent manifest injustice, and that the question of the amount of the verdict will be “reviewed only where so grossly excessive as to shock” the appellate court’s, “sense of justice and to indicate a clear abuse of discretion on the part of the court below.” *Petrie v. Kaufmann & Baer Co.*, 291 Pa. 211, 215, 139 Atl. 878, and other cases cited therein. We do not think that the case at bar is such a case. Furthermore, we think, the defendant’s claim in this connection is unfounded, because the verdicts in favor of both plaintiffs are consistent with the evidence and were not awarded by the jury as a result of sympathy, passion and prejudice, but on sound judgment and with a view to meeting the ends of justice. The amount of the verdict in favor of the infant plaintiff, in the sum of \$15,000.00, is, we do not think, in the light of the evidence respecting the injuries, so grossly excessive as to shock one’s sense of justice, nor is the verdict in the sum of \$2,000.00, for the plaintiff father. Moreover, in view of

the facts and circumstances disclosed by the evidence of record, there is nothing to indicate that the jury were swayed by sympathy, passion or prejudice. The evidence shows that the infant plaintiff's right hand and fingers were mangled and mutilated,—disfigured, maimed and disabled for life, and one need only view the photographs (Plaintiffs' Exhibits Nos. 1 & 2,—filed with record) to see the hand and fingers, as the jury did, and these facts, we think, will be clearly demonstrated, and one cannot help but come to the conclusion that said infant plaintiff is entitled to recover every cent of the \$15,000.00 verdict awarded her and in fact the jury could have awarded more, without being excessive. The hand minus the little finger with its ugly disfiguration, namely, keloid scar tissue from the stub of the little finger completely across the dorsum of the hand, in addition to the scar at the site of amputation, and scars on two of the other fingers of her right hand, plus the deformity resulting from the absence of the little finger, all permanent injuries, were all seen and observed by the jury, and the jury, after giving the same full consideration, arrived at a verdict of \$15,000.00, which under the circumstances, is a just and fair verdict, and therefore should not be disturbed as excessive or reduced by a remittitur, particularly in view of the present day dollar value.

In *Petrie v. Kaufmann*, *supra*, the court, at pages 214, 215, also said:

“Complaint is made of the trial court's refusal to grant defendant relief from what it is urged was an excessive verdict, viz. \$15,000.00. * * * Defendant offered no evidence on this branch of the case, and, while the verdict was large, we are not satisfied that sustaining it constituted an abuse of the trial court's discretion. We can only interfere in such case to prevent manifest injustice. * * * (other cases cited) * * *”

In the case at bar the defendant likewise offered no evidence on this branch of the case.

In *Crane v. Smith*, 23 Cal. (2nd) 288, 144 Pa. (2nd) 356, page 364, where the injury was only loss of part of end joint to index finger and not near as extensive injuries as those sustained by the infant plaintiff herein, the court said:

“* * * Considering the effect which such a physical defect may have upon the child’s mental state as well as her future choice of employment, the award does not warrant the conclusion that it was the result of passion, prejudice or corruption; it is therefore beyond the reach of an appellate court. *Corvello v. Baumsteiger*, 115 Cal. App. 194, 200, 1 P. 2d 484.”

Southern Ry. Co. v. Bennett, (Justice Holmes April 1914) 233 U. S. 80, 58 L. Ed. 860, 34 S. Ct. 566.

Holtzman v. Capital Construction Co., 33 W. L. R. 531.

Harris v. Louisville R. R. Co., 35 Fed. 116.

City of Panama v. Phelps, 101 U. S. Reports 453.

R. R. Co. v. Barron, 5 Wallace Report 90.

NOTE:

It will be noted that under the heading “CONCLUSION”, at page 30 of Defendant’s Brief, the defendant again states that the trial court permitted evidence to indicate that the defendant ought to have replaced the escalator upon which infant plaintiff was injured, with a later model, prior to the date of the accident. This evidence was relevant and competent evidence, for the reasons given and authorities cited under Point II herein, pages 29 to 40, and in addition, we think, defendant’s objection thereto was waived for the reasons given herein, under Point II, pages 40 to 44. The inference attempted to be attached thereto, by the defendant, to the effect that the trial court, by permitting said evidence, indicated to the jury that the defendant, in order to avoid a finding of negligence by the jury, was obliged to replace the 1934 escalator with a later model, prior to the date of the accident, is not a correct or fair inference and it is sufficient to say, we think, that no basis can be found, therefore, in the record. We repeat

that the trial court made no such indication to the jury, but, on the contrary, the trial court left this question entirely for the jury to decide and specifically stated in its charge to the jury, that it was for the jury to say, from a preponderance of the evidence, whether a "person exercising the highest degree of care, skill and foresight within reason for the safe carriage of his passengers would supplant the old installation with the new and would not continue to use the old installation because of the hazards to its passengers" (trial court's charge, at page 221,—for complete charge, see App. 214-227). In this connection the trial court read to the jury (appearing in the court's charge to the jury at page 221 of the Appendix) defendant's requested Instruction No. 4, which had been granted by the court (App. 16 & 206), the trial court, having previously ruled, out of the presence of the jury, that it was a question for the jury to decide (App. 100 & 101). This to be considered by the jury, as an item of evidence, along with all the other evidence in the case relating to or having any bearing on the question of the negligence of the defendant.

Conclusion

In conclusion, it is respectfully submitted that the trial court committed no error and that the verdicts of the jury were proper and consistent with all of the evidence, and that, therefore, the judgment of the United States District Court for the District of Columbia, appealed from, should be affirmed.

Respectfully submitted,

LESTER WOOD,
Attorney for Appellees.

United States Court of Appeals

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

District of Columbia Circuit

FILED JAN 31 1950

No. 10,035

Joseph W. Stewart

CLERK

THE HECHT COMPANY, INC., a Corporation, *Appellant*,

vs.

BETTY-LYNNE JACOBSEN, an infant, by S. Elmer Jacobsen,
her father and S. ELMER JACOBSEN, *Appellees*

PETITION FOR REHEARING

Comes now the appellant in the above entitled cause, by its attorneys, and moves the Court for clarification of its opinion handed down in the above captioned action and for reasons therefore says as follows:

The opinion of the Court applied to the facts in this case has in effect, set up a new criterion which must be followed hereafter in the trial of all cases wherein violation of the proper standard of care becomes an issue to be settled by the jury in the Trial Court. With some concern we point out that the Court in its opinion has left considerable doubt as to the extent of the new doctrine enunciated, all of which is bound to confuse and, in fact, may have far reaching effect in the trial of future cases.

For instance, in this case the facts clearly indicate that the failure to maintain a guard or attendant at the escalators had nothing whatever to do with the injury to the child. The Court will recall the Mother's testimony to the effect that she had been in the store and rode the same escalator many times before; it is clear that she knew the nature of the mechanism and to that end took hold of the infant plaintiff's hand in getting on the escalator. She testified that the escalator was functioning normally and running smoothly. The child tore herself away from the Mother and then, in effect, moved rapidly down the escalator while it was in motion. There is nothing to show that the presence of a guard or of warning signs in any wise could have prevented the accident under the circumstances. The case was not tried on any theory of attractive nuisance. On the doctrine of proximate cause, the Court stated in its opinion (p. 4) "We think that the owner of a department store must be held to be presumptively aware of the tendency of children to stray even from vigilant parents, especially when subjected to the varied fascinations found in such a store. *It is with this tendency in mind that precautions should be taken.* Thus, the failure to take reasonable steps to guard against injuries due to the aperture between the escalator treads and the floor, might properly have been found by the jury to be the proximate cause of the injury."

Does that mean in future trials involving injuries to invitees, especially children in a public place, *regardless of how the accident occurs*, the defendants, in order to avoid liability because of a failure to exercise "reasonable care under the circumstances" must show that they provided attendants or other protective measures throughout a public establishment. In other words, would the juries in future trials be permitted to find, as a fact, that defendants were negligent by reason of their failure to provide attendants, especially in view of the fact that accidents can and do occur to children in public establishments in places other than on escalators. The opinion of the Court seems to

contemplate this duty when it points out "that the owner of a department store must be held to be presumptively aware of the tendency of children to stray even from vigilant parents, especially when subjected to the 'varied fascinations' found in such a store." Also, does the opinion contemplate a greater duty on the part of a merchant in providing for the care and safety of infant invitees while on its premises, than that imposed on others not so engaged and, who likewise receive children invitees on their premises.

If it is not the intention of the Court to so hold, then we respectfully suggest that this part of the opinion should be clarified for future guidance of the Courts, counsel and litigants.

Another point in the opinion which we think needs clarification is that dealing with the failure of the defendant to "guard against injuries due to the aperture between the escalator treads and the floor." In argument before the Court, this question was posed and discussed by counsel for appellants and the writer of the Court's opinion. It was pointed out to the Court from the record that the plaintiff failed to make any showing whatever to the effect that an escalator can be installed and operated without a break in the escalator treads and the comb plate thus permitting the escalator to disappear in motion under the floor. The Court inquired of counsel why the defendant did not make such a showing. We replied that the burden in that regard was on the plaintiff; however, we did have evidence from the inspector of public buildings to the effect that no such escalator was known to have been made or installed. The Court's opinion as now written propounds a question as to future litigation in spite of the fact that no such escalator is, as yet, manufactured, and in spite of the further fact that no known guard or protection has yet been devised to cover the apertures, should the Court permit such a fact to be considered and decided by a jury as an element of negligence.

Again with respect, we believe that the opinion of the Court needs clarification on the matter of showing the duty of a store to install improved models of mechanical devices. The Court, in its opinion said:

* * * "Evidence of the improved model was not admitted for the purpose of establishing a standard of conduct. That would clearly be error. * * *"

The Court, then indicated that evidence of improved models nevertheless should be admitted by the Court only to aid the jury in finding whether appellant took all precautions "within reason". The Court sustained its view under its decision in the *Helwig case*, 71 U. S. App. D. C. 346, 348, 110 F. 2d 546, 548. In this case, the Court below did receive evidence that *well known and approved* scientific safety appliances were known in the industry and that the defendant, if in the exercise of the required care, had reasonable grounds to apprehend that lightning would be conducted over those wires into the plaintiff's home and injure him or his property, it was the defendant's duty to exercise due care in selecting and maintaining such approved appliances as were reasonably necessary to guard against the plaintiff's injuries. That case, we believe, could form no basis for the Court's opinion in this case or as a guide for future cases arising in similar circumstances as we present here because, while it is true the 1941 escalators did have a narrower tread and a smaller aperture, there was no showing that an infant plaintiff, permitting or suffering its fingers to become enmeshed in the apertures would not have suffered the same physical injuries as those sustained on the 1934 model. In other words, while the 1941 escalator was a newer model it afforded the jury nothing to go on so as to permit them to make a finding of lack of due care on the part of the defendant. The Court then, in its opinion, says that:

"Since such evidence goes only to the question of what could reasonably have been done there is no need to prove that a given precaution has attained the status of a custom"

and then cites a number of cases to support the statement in the opinion. We have examined the cases upon which the Court relied, with care. Although we admit for the purposes of this argument that

“there is no need to prove that a given precaution has attained the status of custom”, we earnestly contend that the cases cited by the Court in its opinion do indicate that the plaintiff must make some showing that the newer appliances are in accordance with “the ordinary manner” in which these operations were conducted. Citing *Brigham Young University vs. Lillywhite*, 118 F. 2d 836, 840-1 (C. A. 10th, 1941). For example, in *Washington and Georgetown Railroad vs. McDade*, 135 U. S. 554, 573-4, 34 L. Ed. 235, 242, a witness for the plaintiff testified “That he had never seen such a contrivance *anywhere else*” and there was other evidence in the case to show that the appliance used by the defendant was not in accordance with the ordinary and usual practice in the industry. In this case the only evidence of the use of better devices than those used by the defendant was that of the use by the defendant itself of two escalators in its own store which were more modern than those on which the accident occurred. In the case at Bar there was no evidence at all below to indicate that any store in the District of Columbia or elsewhere used escalators of the newer design other than the defendant above. When this defendant installed the newer models it was done in the light of progress. In the future, if properly advised in view of this opinion, stores or public places in this jurisdiction will be disinclined to partially introduce more modern appliances because it would have the result, in the event an injury occurred on the older models, of subjecting them to the speculations of a jury and the almost certain likelihood of their having to respond in damages.

An invitor conducting a large establishment may find itself financially able to partially install a set of modern

appliances but not to completely equip the store therewith. The owner is then faced with the dilemma of installing a complete turn-over or none at all in order to protect itself against liability in the light of this opinion. It may also be, that a competitor or the owner of some other public place not in competition, might install in the latter place a set of modern appliances. Would it be competent for a future plaintiff to show this to be a fact if the plaintiff sustained injuries while riding an escalator in the store using the older models so as to permit a jury to find negligence on the part of the invitor in failing to install a more modern escalator?

The same difficulty here presented might be posed in future negligence actions involving the use of vehicles or other means of transportation heretofore charged with the duty of using the "highest degree of care." Assuming that a railroad locomotive or a motor vehicle identified as a public carrier is a 1950 model with a certain approved braking device, and is put into service. Its life in service may be a certain number of years. In 1951 a newer or more modern locomotive or motor vehicle with a vastly improved braking device comes on the market and is in use by the carrier in question or one of its competitors. If a person is injured while riding one of the locomotives or motor vehicles equipped with the earlier braking device, would it be competent evidence to be submitted to a jury that a newer and well known improved model was available for purchase by the defendant carrier but that it failed or neglected to do so and as a result of this, the jury now finds evidence of negligence?

All of the foregoing becomes important because of the wide latitude given to a jury in determining the issues of negligence. The present opinion abolishing the degrees of care heretofore recognized in this jurisdiction by particular classifications, now leaves it to a jury to determine what is negligence in the light of their own "common experi-

ence" subject only to that standard of care which imposes upon the invitor the duty of exercising reasonable care and prudence consistent with the apparent or ostensible risk exposed, as demonstrated by the evidence submitted to the jury for its consideration. It leaves the jury without much, if any restriction, the right to say that appliances and equipment which are considered modern and safe today may become obsolete and more hazardous tomorrow because of newer models. If this is to be the law in the District of Columbia its implications are far reaching but, so that inviters might, in the future, know what the Court requires of them, we, with profound respect, believe the Court should clarify its opinion to give full and clear meaning for the guidance of all in future litigation.

CONCLUSION

This petition is filed with profound respect for the Court and its views expressed in the opinion. We feel that the implications of the opinion are far reaching and to that end ask the aid of the Court in reviewing its present opinion in order to ascertain whether or not it should not be clarified as suggested.

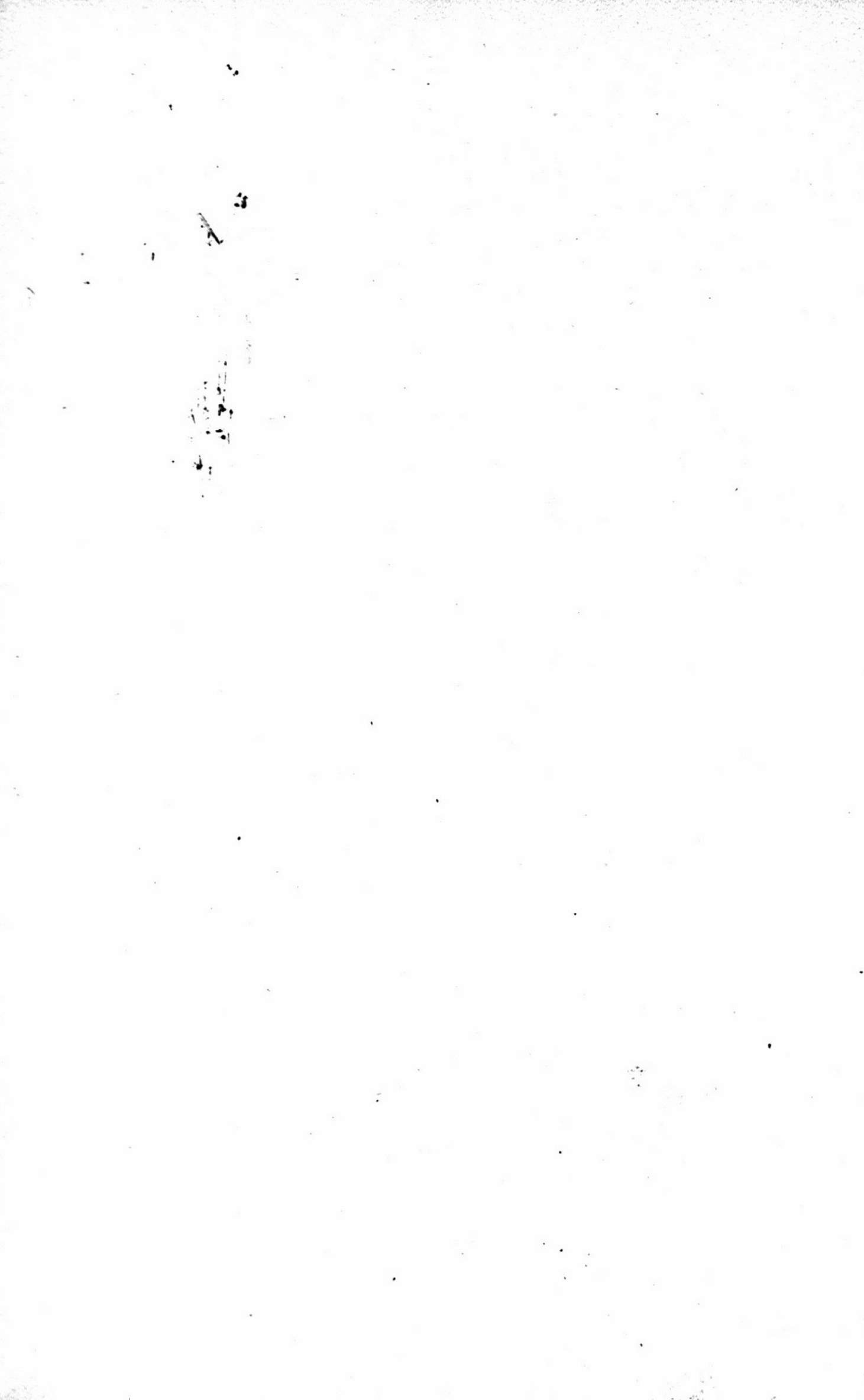
Respectfully submitted,

AUSTIN F. CANFIELD,
RALPH F. BERLOW,
Attorneys for Appellant.

CERTIFICATE

I hereby certify that the above petition is filed in good faith and is not filed for any purpose of delay.

Austin F. Canfield
AUSTIN F. CANFIELD



FILED FEB 9 1950

IN THE

Joseph W. Stewart

United States Court of Appeals CLERK.

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 10,035.

THE HECHT COMPANY, INC., a Corporation,
Appellant,

v.

BETTY-LYNNE JACOBSEN, an infant, by S. Elmer
Jacobsen, her father and S. ELMER JACOBSEN,
Appellees.

**ANSWER OF RESPONDENTS (APPELLEES) IN
OPPOSITION TO PETITION FOR REHEARING.**

Now comes the respondents (appellees), by and through their attorney, and respectfully state that the petition for rehearing, filed herein by the petitioner (appellant), The Hecht Co., Inc., a corporation, should be denied for the reasons set forth herein below:

The petition for rehearing, filed herein by the appellant, fails to raise any new point of law or fact for this Honorable Court to consider, which has not already been covered and raised in the appellant's brief filed herein, and heretofore been considered prior to this Honorable Court's decision rendered on January 16, 1950. The petition for rehearing merely requests clarification of the opinion of this Court, where no clarification is needed, and in addition counsel for appellant have presented no good and sufficient

reason to cause this Court to clarify its opinion and, we believe, for these reasons said petition for rehearing should be denied. Counsel for appellees is unable to agree with the statement made by counsel for the appellant to the effect that the Court, in its opinion, has left considerable doubt as to the extent of the law announced therein, or that the same in any way is bound to confuse in the trial of future cases. The Court's opinion leaves no doubt as to the law announced therein and said opinion is most timely. The authorities quoted and referred to therein and given in support thereof are applicable and in every way support the conclusions arrived at by the Court in rendering said opinion.

The statements made by counsel for the appellant, on page two of its petition for rehearing, to the effect that the facts clearly indicate that the failure to maintain a guard or attendant at the escalator had nothing whatsoever to do with the injuries of the child are not borne out by the evidence of record in the court below. From the record it is obvious that if a guard or attendant had been maintained by the appellant, at the point in question, such attendant could have either prevented the child from falling, or after she fell, picked her up before she put her hand down to help herself up, and thus could have prevented her hand from being caught in the escalator as the evidence shows it was. Likewise, the statement by counsel for the appellant, appearing on page two of said petition, that it is clear that the mother knew the nature of the mechanism, inferring thereby that she knew it was dangerous, is not borne out by the record. The mother testified that she did not know there was any danger (App. 75 on cross examination,—see pages 72, 73 and 74 also). The mother and the child were unaware of any danger and had no knowledge of the dangerous character of the escalator at the point where the child was injured, whereas the appellant knew and had knowledge thereof and, therefore, there was evidence to show that the presence of a guard or warning signs, if provided by

the appellant, could have prevented the accident. The failure of the appellant in this respect was one of the things, among many others, disclosed by the evidence of record, for the jury to consider in determining whether the appellant was or was not negligent, under all the circumstances disclosed by the evidence.

The case at bar deals with the construction, maintenance and operation of an escalator with respect to children being invited and allowed to ride as passengers thereon and, therefore, the suggested examples and illustrations given by counsel for the appellant in other situations where children might be present in the store of a merchant, are beside the point. The answer to be made in such other situations when presented would, of course, have to depend upon the facts and circumstances presented by the evidence relating thereto, and the answer in each case would necessarily have to depend on the evidence then presented. The decision in the case at bar cannot include, in its scope, all conceivable situations where children are or may be present, but the "reasonable care under all the circumstances" rule is flexible and does meet as near as can be met the "infinite number of fact situations which may arise". (page 3 of the Court's opinion)

With respect to the comments made by the Court in its opinion concerning the evidence of the improved model escalator maintained and operated in appellant's store, we likewise see no need for clarification. The statements made by counsel for the appellant in this connection are, in the light of the discussion by the Court in its opinion of this subject matter, without merit. The appellant had direct knowledge of the superior qualities of safety of the newer 1941 model because it had this model in its use, along with the older 1934 model, for some time in its own store, and whether the appellant installed the newer model in the light of progress makes no difference. It was "competent * * * to show what other kinds of machinery or appliances were used elsewhere by the defendant, and might have been used

at the place of the accident' ", (page 6 of the Court's opinion) for the jury to " 'consider what could be done' " by the appellant " 'to secure safety' ", (page 6 of the Court's opinion) and was " 'evidence of what could have been done by the' " (page 6 of the Court's opinion) appellant herein. If by a comparison of the two it was apparent that the new model was safer for use and much less dangerous than the old, it was the duty of the appellant to discontinue its use or "to permit a sound doubt as to whether, if no other reasonable measures were possible, the infant" (plaintiff herein) "ought at all to have been invited or allowed to be exposed to the hazard," (*Reynolds v. May Dept. Stores Co.*, 127 Fed. (2nd) 396, 397), present and existing in the old model in the case at bar, as disclosed by the evidence. The question as to whether the old model escalator created dangers to children and the newer model did not, was a matter for jury determination. (*Reynolds v. May Dept. Stores, supra*). This evidence, as indicated by the Court, goes to the question of "whether appellant took all precautions" " 'within reason' ", (page 5 of the Court's opinion) and served to aid the jury in its determination only in this connection as one piece of evidence in the case, along with all the other evidence in the case.

The petitioner (appellant) cites no new authorities in support of its petition for rehearing. The three cases mentioned by appellant therein, have already been cited by the Court in its opinion.

Conclusion.

For the foregoing reasons it is respectfully submitted that the petition for rehearing, filed herein by the petitioner (appellant), should be denied.

Respectfully submitted,

LESTER WOOD,
Attorney for Respondents (appellees).

